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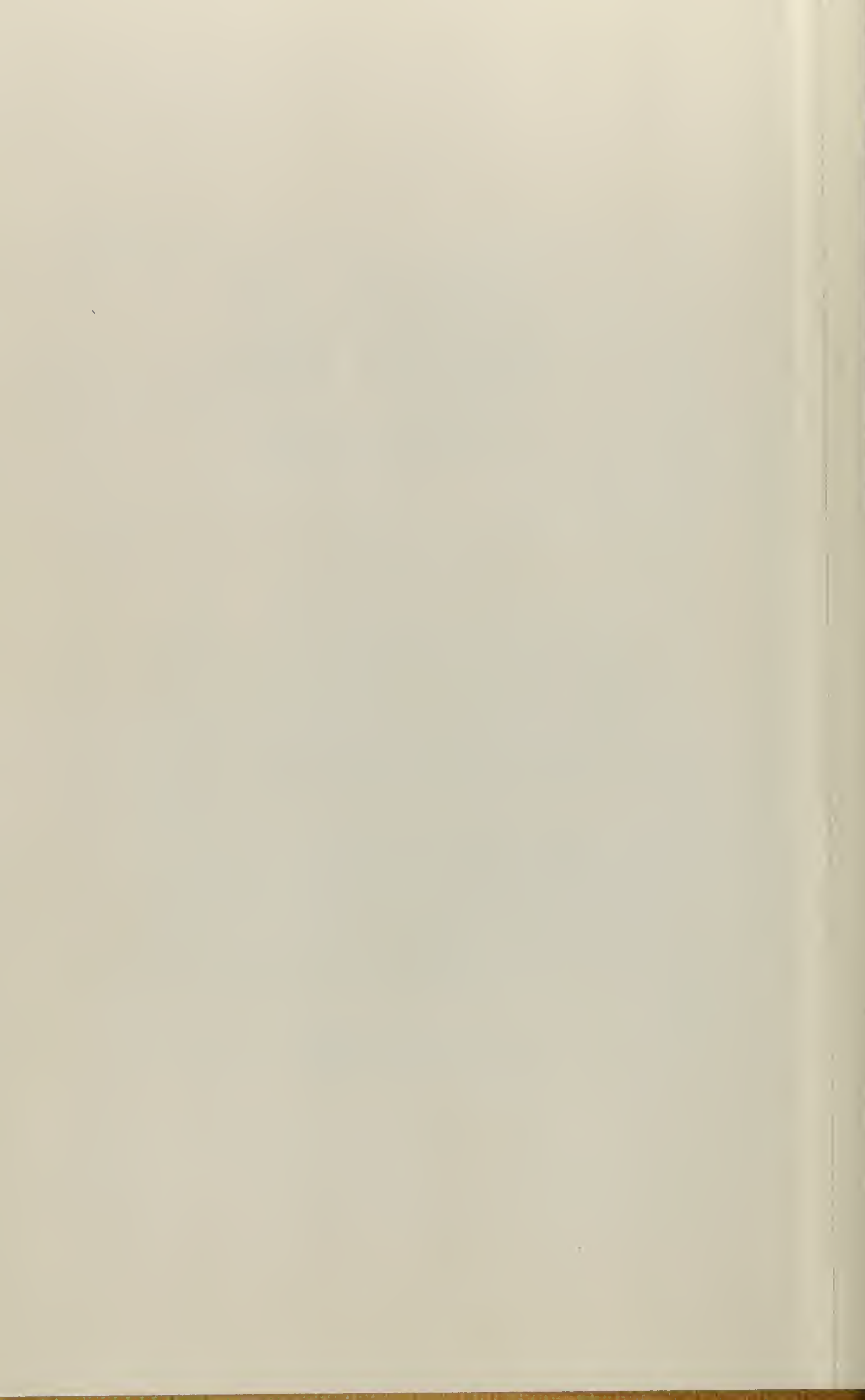

No. 9193

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol 2140

F. G. WHITE,

Appellant.

vs.

B. J. BRADNER, as Receiver for Lake View Oil and Refining Company, OIL WELL SUPPLY CO., and A. D. MITCHELL,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED
AUG [illegible] 1939
PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9193

United States

Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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JEROLD E. WEIL, Esq.,
BRADNER & WEIL,
1120 Rowan Building,
Los Angeles, California. [1*]

In the United States District Court, Southern District of California, Central Division.

In Equity—No. T-121-J.

NORA L. POWERS, et al.,

Complainants,

vs.

LAKE VIEW OIL AND REFINING COMPANY, a corporation,

Defendant.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

VALUATION
LAKEVIEW OIL & REFINING COMPANY
PRODUCTION EQUIPMENT AND REFINERY

April 7, 1937 [10]

RALPH J. REED
Member American Society of Civil Engineers
Member American Society of Mechanical Engineers
Edison Building
601 West Fifth Street
Los Angeles

April 7, 1937

Mr. Paul J. Hisey,
Receiver for Lake View Oil and Refining Company,
609 South Grand Avenue,
Los Angeles, California.

Dear Sir:

The following report is a valuation of the physical assets of Lake View Oil and Refining Company located upon its leased properties near Maricopa, California, named and described as follows:

Title Insurance and Trust Company Lease

NW ¼ of Sec. 4, T 11 N., R. 23 W., S.B.M., known in your operations as the Interstate, Pat Welch, Lake View (Pentland) and International properties.

Midway Fields Lease

NW¼ of SW¼ and W½ of W½ of NE¼ of SW¼ Sec. 4, T. 11 N., R. 23 W., S.B.M.

El Dora Lease

(U. S. Oil and Gas Lease "Los Angeles" 033378) S ½ of NW ¼ of SE ¼ of Sec. 32, T. 12 N., R. 23 W., S.B.M.

Smith Lease

(U. S. Oil and Gas Lease "Los Angeles" 034641) Lot 7, Sec. 6, T. 11 N., R. 23 W., S.B.M.

These assets include production equipment at Pat Welch Well No. 44, Lake View Wells Nos. 1, 5, 7, 13, 17, and 19, International Wells Nos. 3, 4, 5, and 7, Midway Fields Wells Nos. 6, 12, and 16, and El Dora Wells Nos. 4, 6, and 8, with gathering and shipping pipe lines and tanks. They also include a small refinery, a boiler plant, a warehouse and office, and a machine shop located on the Pentland lease; [11] together with miscellaneous cottages and camp buildings on the Pentland and El Dora Leases, drilling equipment, warehouse stock and automotive equipment. Furniture in the Los Angeles office is also included. The properties were inspected on March 30, 1937. The physical assets described, which are in general those listed and described in my report to you dated June 10, 1931, are valued at their fair market value, not on the basis of salvage, but with the understanding that continuous operation of the properties for crude oil production is con-

templated, with provision for operation of the refinery at an economical rate.

PRODUCTION EQUIPMENT AND TANKS

Equipment at the wells consists generally of wooden derricks, rigged for pumping with gas engines, and for handling tubing and rods. These, with rods, tubing, and recoverable casing are the principal items of value.

PRODUCTION EQUIPMENT

Pat Welch Well No. 44 (not producing)
136′ rotary derrick, 40 HP Western gas engine and accessories, Trumble gas trap.
Total Equipment ....$ 425.00

Lake View Well No. 1
106′ standard derrick, 40 HP Western gas engine and accessories, 2590′ of 2½″ upset tubing, 2590′ of ¾″ D & B rods, 2200′ of 6¼″ casing, 2200′ of 4¾″ casing.
Total Equipment 1,660.00

Lake View Well No. 5
106′ standard derrick, 40 HP Western gas engine and accessories, 2560′ of 2½″ upset tubing, 2560′ of ¾″ D & B rods, 2550′ of 8¼″ casing.
Total Equipment 2,010.00

[12]

Lake View Well No. 7
106′ standard derrick, 40 HP Western gas engine and accessories, 2838′ of 2½″ upset tubing, 2838′ of ¾″ Axelson and D & B rods, 2500′ of 8¼″ casing, 2550′ of 6¼″ casing, 2900′ of 4½″ casing.
Total Equipment 3,055.00

Lake View Well No. 13

106′ standard derrick, 40 HP Western gas engine and accessories, 1860′ of 2½″ upset tubing, 578′ of 3″ straight tubing, 2440′ of ¾″ Axelson rods, 2200′ of 8¼″ casing.

Total Equipment 1,860.00

Lake View Well No. 17

106′ standard derrick, 40 HP Western gas engine and accessories, 2400′ of 8¼″ casing, 2400′ of 6¼″ casing.

Total Equipment 1,935.00

Lake View Well No. 19

106′ standard derrick, 40 HP Western gas engine and accessories, 2420′ of 2½″ upset tubing, 2420′ of ¾″ D & B rods, 2500′ of 6¼″ casing.

Total Equipment 1,440.00

International Well No. 3

106′ standard derrick, 30 HP Union Tool Ideal gas engine and accessories, 2750′ of 2½″ upset tubing, 2750′ of ¾″ Axelson rods.

Total Equipment 900.00

International Well No. 4

106′ standard derrick, 30 HP Union Tool Ideal gas engine and accessories, 3020′ of 3″ straight tubing, 3020′ of ¾″ Axelson rods.

Total Equipment 1,155.00

International Well No. 5

106′ standard derrick, 30 HP Union Tool Ideal gas engine and accessories, 3250′ of 2½″ upset tubing, 3250′ of ¾″ Axelson rods.

Total Equipment 1,000.00

[13]

International Well No. 7 (not producing)

106′ standard derrick, 30 HP Union Tool Ideal gas engine and accessories.

Total Equipment 255.00

Midway Fields No. 6

106′ rotary derrick, 40 HP Western gas engine and accessories, 2650′ of 2½″ upset tubing, 2650′ of ¾″ D & B rods, Trumble gas trap, Oil heater.

Total Equipment 1,025.00

Midway Fields No. 12

122′ rotary derrick, 40 HP Union Tool Ideal gas engine and accessories, 2932′ of 2½″ upset tubing, 2932′ of ¾″ Axelson rods.

Total Equipment 1,010.00

Midway Fields No. 16

122′ rotary derrick, 40 HP Union Tool Ideal gas engine and accessories, 2590′ of 2½″ upset tubing, 2590′ of ¾″ API D & B rods.

Total Equipment 880.00

El Dora Well No. 4

116′ standard derrick, 30 HP Superior gas engine and accessories, 2300′ of 8¼″ casing.

Total Equipment 1,290.00

El Dora Well No. 6

114′ standard derrick, 30 HP Superior gas engine and accessories, 2500′ of 3″ tubing, 2500′ of ¾″ rods, 2350′ of 8¼″ casing, 2850′ of 6¼″ casing, 3000′ 4½″ casing.

Total Equipment 3,440.00

El Dora Well No. 8

112′ IDECO steel derrick.

Total Equipment 535.00

TOTAL $23,875.00

[14]

PRODUCTION TANKS

1—1000 bbl. tank, No. 45
2—1100 bbl. tanks, Nos. 30, 31
9—2000 bbl. tanks, Nos. U-1, U-2, 7, 8, 9, 10, 1810, 1812, 1830
Galvanized Iron or Bolted

1—2600 bbl. tank, No. 43
1—2000 bbl. tank, No. U-5
Riveted Steel

—
14 Tanks .... $ 1,300.00

SUMMARY

Total Production Equipment $23,875.00
Production Tanks .... $ 1,300.00

TOTAL $25,175.00

PRODUCTION PIPE LINES

These include oil gathering and shipping lines with shipping pumps, and water, gas, and steam lines on the various leases. They do not include pipe lines in and around the refinery and from the refinery to the various loading racks.

LEASE LINES

Interstate Lease
2838′ of 3″, 693′ of 4½″ and 549′ of 6″ pipe line .... $ 340.00

Pat Welch Lease
177′ of 2″, 607′ of 2½″, and 2036′ of 3″ pipe line .... $ 150.00

Lake View Lease
2449′ of 1″, 1030′ of 2″, 5328′ of 2½″, and 674′ of 3″ pipe line .... $ 520.00

International Lease
1875′ of 2″, 3078′ of 2½″, 2262′ of 3″, 180′ of 4″, and 70′ of 6″ pipe line .... $ 450.00

Midway Fields Lease
5025′ of 2″, 1875′ of 2½″, and 1800′ of 3″ pipe line .... $ 380.00

[15]

El Dora Lease
3819′ of 2″, 3206′ of 2½″, 2786′ of 3″, and 150′ of 4¾″ pipe line .... $ 530.00

Smith Lease
1437′ of 2½″, and 685′ of 3″ pipe line .... $ 105.00

SHIPPING LINES

El Dora
720′ of 3″, 1785′ of 4″ and 3087′ of 4¾″ pipe line .... $ 385.00

Alford Line
1650′ of 3″ pipe line .... $ 100.00

Midway Gas Line
1680′ of 2½″, and 420′ of 3″ pipe line .... $ 100.00

Total Lease Lines .... $ 3,060.00

SHIPPING PUMPS

1—Trahern 3″ gear pump with 6 HP gas engine
1—6″x5¾″x6″ Blake-Knowles duplex pump
2—6″x4″x6″ Worthington duplex pumps
1—6″x4″x6″ Fairbanks-Morse duplex pump
1—10″x5″x12″ Smith-Vaile duplex pump
1—7½″x4½″x12″ Worthington duplex pump
1—2″ American centrifugal (Fig. E45274) belt-driven by 6 HP 220-V. Motor
2—10″x6″x12″ Gardner duplex pumps

—

10 Pumps .... $ 545.00

SUMMARY

Pipe Lines .... $ 3,060.00
Pumps .... $ 545.00

Total .... $ 3,605.00

[16]

REFINERY

The company's refinery on the Lake View lease is a small skimming plant used for production of straight run gasoline for blending purposes, stove oil or kerosene distillate, diesel fuel, and fuel oil. Occasionally road oil is produced. Its maximum throughput capacity is from 1800 to 2000 barrels of crude per day. While the plant is in operating condition, little of its equipment is modern, and maintenance expenditures have been minimized. Rundown and storage tanks are old, generally in poor condition and a number of the flat and corrugated galvanized iron tanks have concrete bottoms.

A few changes have been made in the plant since it was inspected in 1931. These include replacement of one of the small tubular stills with a new one of similar type, but with a coil of 2½″ tubing, the abandonment of the shell still formerly used, and the replacement of the 4′ x 18′ Southwestern fractionator with a 3′ x 52′ Southwestern fractionator purchased in 1933. Two 5′ x 12′ shells formerly used as dephlegmators are now in service as wash towers for gasoline treatment.

The refinery equipment is listed and valued as follows:

Stills

2—tubular stills, complete, one with 1920′ of 2½″ tubing in the coil, one with 2400′ of 2½″ tubing in the coil

1—shell still, 6′6″x36′, with setting) and stack)

1—abandoned tubular still) No value

.... $ 3,000.00

Heat Exchangers

2—"pipe line" type, 4′6″x16′, and 5′6″x21′6″.......... $ 1,000.00

Vapor Towers

1—8′x10″ horizontal primary vaporizer

1—6′x15″ dephlegmator

1—5′x20′ Southwestern evaporator

1—3′x52′ Southwestern fractionator.......... $ 1,950.00

[17]

Condensers

1—1500 sq. ft.—3 section C.I. Southwestern

2—1000 sq. ft.—2 section C.I. Southwestern

1— 180 sq. ft.—1 section C.I. Southwestern

1— 500 sq. ft.—1 section steel "

1— 240 sq. ft.—1 section steel " .... $ 4,400.00

Cooling Tower

16′x24′ cooling tower, 32′ high, with concrete basin .... $ 300.00

Agitator

12′x18′ agitator, with acid tank and blow case.......... $ 500.00

Instruments, gages, etc.......... $ 250.00

Pumps

1—10″x6″x10″ Worthington duplex pump

3—6″x4″x6″ Worthington duplex pumps

1—7½″x7″x10″ Worthington duplex pump

1—5½″x5½″x7″ Worthington duplex pump

3—5¼″x3½″x5″ Worthington duplex pumps

1—4½″x2¾″x4″ Worthington duplex pump

1—3″x2″x3″ Worthington duplex pump

2—7″x4½″x10″ Fairbanks-Morse duplex pumps

1—6″x4″x6″ Fairbanks-Morse duplex pump
1—7″x3″x8″ Snow duplex pump
7—7″x4½″x10″ Smith-Vaile duplex pump
1—10″x5″x12″ Smith-Vaile duplex pump
1—6″x4″x6″ Oil Well duplex pump
1—7½″x5″x6″ Dow duplex pump
1—7″x4½″x10″ Pratt duplex pump
1—5½″x3½″x7″ Union duplex pump
2—4″x2½″x6″ National duplex pumps
2—12″x6¾″x14″ National duplex pumps
1—A.W.P. Gumbo Buster

—

26 duplex pumps $1,380.00

1—2½″ American centrifugal with 5 HP 220-V. motor
1—1½″ centrifugal with 3 HP, 220-V. motor [18]
1—5″ Type L, Form E, Krogh centrifugal with 6″x6″ vertical steam engine

—

3 centrifugal pumps ....$ 310.00

$ 1,690.00

Loading Racks

Gasoline loading rack, 200 barrel road oil tank and loading rack, 20-spot car loading rack for fuel oil and refined products on Sunset Western Railroad Spur ....$ 800.00

Buildings

10′x20′ wood frame and corrugated iron laboratory, with equipment; 5′x8′ wood frame and corrugated iron gagers office, with equipment; drinking water supply shed and tank....................$ 100.00

Tankage

1—9′x30′ surge tank
1—7′x23′ surge tank
1—8′x8′x5′ trap tank

2—5'x12' wash towers (old dephlegmators)
1—25 bbl. tank
3—50 bbl. tanks
1—100 bbl. tank

—

10 tanks .... $ 675.00

3—100 bbl. tanks, Nos. 40, 41, 46
2—200 bbl. tanks, Nos. 43, 47
5—240 bbl. tanks, Nos. 20-24 incl.
2—500 bbl. tanks, Nos. 25, 26
6—1500 bbl. tanks, Nos. 1, 2, 3, 4, 5, 36
11—2000 bbl. tanks, Nos. U-3, U-4, 11, 12, 27, 28, 29, 32, 33, 34, 38
2—2500 bbl. tanks, Nos. 20, 21
6—2600 bbl. tanks, Nos. 2530, 2533 incl., 39, 40

—

37 galvanized iron or bolted tanks............$2,800.00

[19]

1—5000 bbl. tank, water seal roof, old No. 22, now No. 14
1—8500 bbl. tank, water seal roof, old No. 24, now No. 124
2—10,000 bbl. tanks, one open, one wood roof, old Nos. 45, 46, now Nos. 145, 146

—

4 riveted steel tanks..............................$1,350.00

$ 4,825.00

Pipe Lines
Transfer lines within the refinery, including loading rack lines.............................$ 2,750.00

Refinery and equipment..............................$21,565.00

BOILER PLANT

The boiler plant near the refinery on the Pentland lease consists of three 70 HP fire box boilers (2 O.W.S. Co. Nos. 3044-27 and 3046-28, and 1 Broderick No. 3012-31, maximum allowable operating pressure 150# per square inch) and two 225 HP water tube boilers of the Shipping Board type (Main Iron Works Nos. 1479-20 and 1480-20, maximum allowable working pressure 175# per square inch). The boilers are equipped with oil and with gas burners, and have water level controls. Auxiliary equipment consists of two feed water pumps, a 10″ x 10″ x 10″ steam driven National Supply air compressor, a Cochrane feed water heater, and a home made heater, with a 100 barrel fuel oil tank, a 200 barrel fresh water tank, and a concrete hot well. The water tube boilers are housed in a 40′ x 60′ wood frame and corrugated iron building, and the fire box boilers in a 20′ x 24′ addition of similar construction.

A 10 KW, 120 Volt Fairbanks-Morse D.C. generator, belt-driven by a 20 HP vertical steam engine, installed in the boiler house, and formerly used to supply current for lighting, is not now operated. Purchased electric current is distributed to the refinery, the camp buildings, and the wells (except those in the El Dora and Smith leases) by an overhead distribution system supported on 20′ cedar or redwood poles to which no value is now assigned.

Boiler Plant ....$ 4,375.00

[20]

DRILLING EQUIPMENT AND TOOLS

The small assortment of old standard drilling tools, assembled on two platforms south of the warehouse, is considered of no value, and no value is assigned to a small assortment of roustabout tools. Old rotary drilling equipment on hand consists of the following:

2—#5C Ideal rotary draw works (1 at Pat Welch 44, 1 at El Dora 4)
2—10"x10" Ideal twin drilling engines (1 at Pat Welch 44, 1 at El Dora 4)
2—Ideal rotary tables, complete (1 at Pat Welch 44, 1 at El Dora 4)

Item	Location
1—12"x12" Gumbo Buster drilling engine	at Pat Welch 44
1—portable sand reel	
1—10"x12" Ajax drilling engine	
1—hoisting drum	
1—14"x7"x18" Wilson Snyder mud pump	
2—12"x6¾"x14" Ideal mud pumps	

2—12"x6¾"x12" Gardner mud pumps—at El Dora 4
Miscellaneous used fish tail and disc bits, slips, elevators, reamers, subs, and casing tongs, on racks at Pentland lease.
This equipment is second or third hand and is valued at .... $ 1900.00
Tubular goods on the racks consist principally of
2779'—3½" O.D. 11.2# drill pipe with 4¼"x30' drill stem
2700'—4½" O.D. 12.75# drill pipe
4290'—5 9/16" O.D. 22.2# drill pipe with 6"x52' drill stem
This drill pipe has seen considerable use and the tool joints are in poor condition.
It is valued at .... $ 3,100.00

Total drilling equipment .... $ 5,000.00

WAREHOUSE-OFFICE-GARAGE, MACHINE SHOP

A wood frame and corrugated iron building 22′ x 80′, with its floor four feet above the ground, provides office and warehouse space. "Lean-to" sheds on the west and north sides of the building furnish shelter for automobiles and trucks. The machine shop building is also a wood frame and corrugated iron structure, 24′ x 100′, with dirt floor, to which has been added a [21] 24′ x 25′ automobile repair shop, with concrete floor and pit. In addition to miscellaneous hand tools, it contains the following equipment, which, though old, is in fair operating condition and is in continuous use on repair and maintenance work.

1—18″x12′ American lathe
1—18″x9′ American lathe
1—20″ Champion drill press
1—24″ Aurora drill press
2—2 stone grinding wheels
1—5″x5″ Rix vertical air compressor
2—Power hack saws
1—Type 3-G Smith and Mills shaper—20″
1—#36 Little Giant bolt threader, with dies
1—10½″x12″ O.W.S. vertical steam engine
3—Parker vises
2—4′x4′ gas treating furnaces
1—Type MP 101 Prestoweld stationary portable electric welding machine
1—Oxweld acetylene welding torch, tips and hose
1—Prestoweld acetylene cutting torch
1—Size S Black and Becker electric drill
1—VE Buffalo forge and blower

1—24″ Star drill machine blower
1—Type MP 101 Prestoweld 60 cu. ft. acetylene generator
Office-warehouse, garage building, including office furniture $1,350.00
Machine shop and equipment $2,350.00

$ 3,700.00

BUILDINGS

All buildings of any particular value other than those previously noted are listed below. Living quarters on the Pentland lease, and on the El Dora lease, are included, together with the shop building, garage and boiler house on the latter lease. The houses are light frame structures of the California type, and, except for the Fisher and Perrizo houses, not in very good repair.

Pentland Lease
Cottage 24′x26′ (Fisher)
Cottage (Formerly Directors')
Cottage (Dower)
Cottage (Perrizo)
3 small garages
Pentland Lease houses .... $ 1,200.00

[22]

El Dora Lease
Office 10′x20′
Cottage 14′x40′
Cottage 14′x40′
Cottage 12′x48′
Garage 18′x50′
Shop 18′x50′) Wood frame and
Boiler house 32′x50′) corrugated iron
El Dora Lease buildings .... $ 500.00

$ 1,700.00

WAREHOUSE STOCK

The miscellaneous current warehouse stock, which includes cement, clay, sulphuric acid and other chemicals, valves, fittings, engine repair parts, brass condenser tubes, etc., together with 3 small second hand Southwestern condensers in the yard is valued at ....$ 750.00

AUTOMOTIVE EQUIPMENT

Make and Type	Engine No.	First Sold
Ford truck (Model T)................	8754340	1924
Ford Sport Coupe................	A2609494	1929
Ford pick-up................	A2333543	1929
Chevrolet truck (Flat body)................	T2738662	1931
Chevrolet truck (Tank)................	T3830090	1933
Cadillac Victoria................	M-57-J-63	1919
Cadillac Victoria................	63-H-899	1924
Moreland Truck (1½ ton)................	12983	1923
Pike Trailer................	Factory No. 394	1922
Total value of automotive equipment................$1,010.00		

LOS ANGELES OFFICE EQUIPMENT

Safe cabinet, desks, chairs, typewriters, adding machine, Marchant calculator and miscellaneous equipment in Rooms 512 and 513, Edwards and Wildey Building, Los Angeles ....$ 550.00

[23]

SUMMARY

Production Equipment and Tanks	$25,175.00
Production Pipe Lines	3,605.00
Refinery	21,565.00
Boiler Plant	4,375.00
Drilling Equipment	5,000.00
Warehouse and Machine Shop	3,700.00
Buildings	1,700.00
Warehouse Stock	750.00
Automotive Equipment	1,010.00
Los Angeles Office Equipment	550.00
Total	$67,430.00

Very truly yours,

RALPH J. REED.

[Seal] Registered Civil Engineer Ralph J. Reed. No. 1689, State of California. [24]

[Endorsed]: Filed Apr. 17, 1937. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk. [25]

APPRAISAL

of the

Underground Reserves of the

LAKE VIEW OIL & REFINING COMPANY

as of April 1, 1937

By GLEN M. RUBY and

A. A. CURTICE. [27]

INTRODUCTION

At the request of Mr. Paul Hisey, Receiver, the following appraisal of the underground reserves of the Lake View Oil and Refining Company has been made. The purpose of the appraisal is to determine the fair market value of the reserves as of April 1, 1937.

The results of the appraisal are herewith respectfully submitted.

GLEN M. RUBY,
A. A. CURTICE. [29]

SUMMARY OF APPRAISAL

Producing Properties	
Estimated Gross Future Production of Oil	384,130 bbls.
Estimated Net Future Production of Oil	336,140 bbls.
Gross Value of Estimated Net Production	$307,290.00
Net Value of Estimated Net Production	72,090.00
Present Worth	$56,310.00
Value of Deep Zone Prospects of Properties on Thirty-five Anticline	26,200.00
Value of Elk Hills Lease	9,000.00
Total Value	$91,510.00

[30]

LOCATION

All of the properties but one are located on or near the Thirty-five anticline in the southwest portion of the San Joaquin Valley, in Kern County, California. The other property is located in the Elk Hill district, also in Kern County.

Following is a list and description of the properties:

Name of Property	Description	Acreage
Pentland) International) Pat Welch)	Comprise N.W.¼, Sec. 4, T11N-R23W	160
Midway Fields	N.W.¼ of S.W.¼ and Westerly 10 acres of N.E.¼ of S.W.¼, Sec. 4, T11N-R23W.	50
El Doda 32	S.½ of N.W.¼ of S.E.¼, Sec. 32, T12N-R23W.	20
El Dora 6	N½ of S.E.¼ of N.W.¼ and 12 acres from N½ of S.W.¼ of N.W.¼, Sec. 6, T11N-R23W	32
Elk Hills	N.W.¼ and W½ of N.E.¼ and N.½ of S.W.¼ and S.W.¼ of S.W.¼ of Sec. 8, T31S-R25E	360
	Total acreage	622

GEOLOGY AND PRODUCING HORIZONS

The subject of the geology and producing horizons of the Thirty-five anticline is thoroughly covered in the following publications:

(1) Summary of Operations of California Oil Fields, Volume 9, No. 5, issued by the California State Mining Bureau. Article entitled, "Report on Southeastern portion of Thirty-five Anticline, Sunset Oil Field, Kern County, California," by W. A. Copp and H. A. Godde.

(2) Summary of Operations of California Oil Fields, Volume 12, No. 11. Article entitled, "Development of the Maricopa [31] Shale Production in

the Southeastern Portion of Thirty-five Anticline, Sunset Oil Field, Kern County, California," by H. A. Godde and E. H. Musser.

The Thirty-five anticline is a southeasterly plunging fold, which is slightly asymmetric with the steeper flank on the southwest side. It has a core of Maricopa shale, with its included sandy phases, which is of the Upper Miocene age. The Maricopa formation is overlain unconformably by the less consolidated sands and shales of the McKittrick formation, the lower portion of which is equivalent to the Etchegoin formation of Pliocene age.

Down the flanks of the fold and also down the plunge, the Maricopa formation lies in contact with progressively lower phases of the McKittrick formation, which wedge in or buttress against the shale.

There are six producing oil zones in the McKittrick formation. From the top down, they are: (1) Top Oil Zone, which has a thickness of from 50 to 70 feet; (2) Kinsey Oil Zone, thickness 175 to 205 feet; (3) Wilhelm Oil Zone, thickness 130 to 170 feet; (4) Gusher Oil Zone, thickness about 90 feet; (5) Calitroleum Oil Zone, thickness up to 110 feet, and (6) Buttress Oil Zone, maximum thickness probably not over 50 feet.

The latter two zones pinch out southeast of the center of Section 4, T 11 N-R 23 W and are not present under the properties of the Lake View Oil and Refining Company except on the flanks of the

structure where they are non-oil-bearing. [32]

There are intermediate water sands between the Top Oil Zone and the Kinsey Oil Zone and between the latter and the Wilhelm Zone.

Attempts to develop production from the Maricopa formation have been hazardous undertakings. The horizons from which commercial production has been obtained are limited in area and diverse as to stratigraphic position and lithologic character. The sandy phases are lenticular and more tightly compacted than the sands in the overlying McKittrick formation. Much of the oil comes from fratured zones in the shale.

There are three small areas in which commercial production has been obtained from the Maricopa Shale. The first one lies in the vicinity of Well No. 16 of the Standard Oil Company in Section 31, T 12 N-R 23 W. In this area the production comes from a thin zone of sandy shale and fractured shale less than 75 feet below the top of the Maricopa formation.

The second area is in the vicinity of the Obispo Oil Company property in the southwest quarter of Section 32, of the same township. In this area, the oil comes from a horizon of shale with thin stringers of sand, which occurs between 1000 and 1100 feet below the top of the Maricopa. It is difficult to correlate from well to well, and the rates of production vary greatly from location to location.

The third area is in the north half of Section 10, [33] T 11 N-R 23 W, where lenses of sand occur in the upper 300 to 400 feet of the Maricopa formation.

The maximum penetration of the Maricopa shale was made in Well No. 5-A of the Pacific Oil Company in Section 32, T 12 N-R 23 W, which encountered the top of the formation at 2977 feet, and reached a total depth of 4848 feet. Although showings were encountered in this well at various depths, tests made at various levels failed to obtain commercial production.

Messrs. Godde and Musser make the following statements in their article referred to above, "After reviewing the history of development in the Maricopa shale, it is evident that drilling for oil from this source is expensive and very uncertain. It is expensive for the reason that in some areas there are one or more productive overlying zones that require careful protection. It is uncertain due to the lack of uniform distribution of the productive pools, to the lack of marker beds which makes correlation extremely difficult, and to the occurrence of oil in fractured shale. The latter statement is of great importance, as heretofore practically all production from the Thirty-five anticline has come from sand strata.

"A study of Plate I indicates that all wells producing from the Maricopa shale are located on or near the axis of the Maricopa shale high. The

most prolific wells have been drilled near the change in trend of the structure from an [34] eastward to a southeastward direction. Hence it appears that the best locations for future prospecting in the Maricopa shale would be along the axis of the structure in the southeast quarter of Section 31 and the southwest quarter of Section 32. There are also good possibilities in the northeast quarter of Section 6 and the northwest quarter of Section 5."

BRIEF HISTORY OF DEVELOPMENT

Development on the properties of the Lake View Oil and Refining Company started in the early days of the field prior to 1914. On May 10, 1914, Well No. 1 of the Lake View No. 2 Oil Company (the predecessor of the Lake View Oil and Refining Company) blew wild and produced an estimated quantity of 6,000,000 barrels of oil between that date and October 15, 1914, when it stopped flowing.

During the early days, the properties were held under separate ownership by various oil companies. Most of the development was done prior to the formation of the Lake View Oil and Refining Company.

As the successively deeper zones of the Thirty-five anticline were discovered, sporadic development took place on most of the properties. A total of forty-six wells were drilled on the leases. Thirty-one of these wells have been abandoned, three are idle and twelve are producing at the present time.

During the early stages of development, the various [35] producing zones were inaccurately defined in many cases and intermediate waters were not shut off. Infiltration of intermediate water and the natural encroachment of edgewater, as the oil was withdrawn, have resulted in the flooding of all of the producing horizons. The percentage of water produced by the wells of the Lake View Oil and Refining Company in February 1937 varied from 68 to 95 percent. The average was 84.6

At least three wells on these leases were drilled into the Maricopa shale. In 1922, Pentland No. 15 was drilled to a depth of 3615 feet, having encountered the top of the Maricopa at 3009 feet. The 6¼-inch casing was cemented at 2833 feet and the well was bailed dry, practically no fluid entering the hole.

In 1925, Mr. F. M. Smith, trustee, drilled Well No. 8 on the El Dora lease in Section 32, to a depth of 4718 feet, having encountered the top of the Maricopa at 3212 feet. The drill pipe twisted off at 3793 feet. No production was obtained from tests made between the depth of 3425 and 3600 feet.

In March 1931, Pat Welch No. 44 was completed in the upper Maricopa shale at a depth of 4205 feet. The 6⅝ inch water string was cemented at 3962 feet which is approximately the top of the Maricopa. The well started producing at the rate of 120 barrels of 23-gravity oil per day. Within a year the water content had increased to over 90 percent. The [36] well produced a total of 22,156

barrels of oil up to the time it was shut down in March 1934. During that month, it produced at the rate of 9 barrels per day which is below the economic limit for a well of that depth.

Recent development in the zones above the Maricopa shale include the drilling of Midway Fields No. 16 to the Kinsey zone and the deepening of Midway Fields No. 6 to the same zone. The former well was completed in June 1930 with an initial production of 150 barrels of 24-gravity oil per day and a cut of 10 percent.

In February 1937, this well produced at the rate of 29 barrels per day with a cut of 86 percent. The well has produced a total of 140,606 barrels to date.

Midway Fields No. 6, formerly a Top Zone producer, was deepened to the Kinsey Zone and completed in March 1933 with an initial production of 200 barrels of 21-gravity oil per day and a cut of 0.5 percent. A year later the cut was increased to 53 percent. In February 1937, the well produced at a rate of 3.3 barrels per day with a cut of 68 percent. The total production from the date of recompletion to the present is 74,714 barrels.

METHOD OF APPRAISAL

Both zone-decline and individual-well-decline curves were used in estimating the future production of the wells on these properties. The only de-

velopment work contemplated in this appraisal includes the re-perforating of Wells Nos. [37] 4 and 8 on the El Dora lease in Section 32, and the reconditioning of Midway Fields No. 6. The work on the El Dora wells is in the process of being done, while the re-conditioning of Midway Fields No. 6 is definitely planned. After a short period of flush production, it is believed that these wells will settle to the average of neighboring wells in the same zones.

Two of the wells, Pentland Nos. 5 and 13 are producing below the economic limit. However, it is considered necessary to continue producing these wells in order to hold down the water content in nearby producers.

Due to the state of declined production rate, the condition of water-flooding of all of the known zones and the rapid contact between wells in the same zone, it is believed by the writers of this report that the drilling of new wells on the properties now producing is not justified. Therefore no additional development is contemplated in this appraisal.

All of the leases are producing on the minimum royalty basis of 12½ percent.

Present prices were used in calculating the gross value of estimated future production.

Production expense, including general overhead and taxes was estimated at $225. per well per month.

The net value of future production was discounted to present worth at 10 percent, using the discount factor prepared by the Bureau of Internal Revenue for the use of the oil industry. [38]

EL DORA, SECTION 6

The El Dora property in Section 6 lies a short distance north of the easterly plunging Phoenix syncline which forms the structural depression between the Thirty-five anticline and the Maricopa flat monocline. The Gibson sand, which has accounted for most of the production on the Maricopa Flat, does not extend as far northwest as the El Dora property.

The El Dora Oil Company drilled a well in the northwest corner of the property in 1923. This well was drilled to a depth of 2298 feet with the 4¾-inch water string cemented at 2108 feet. The well came in in March 1923 with an initial production of 46 barrels of 19-gravity oil per day, and a cut of 2 percent. In September 1926, the derrick caught fire and burned down and the well has been off production since. At that time, it was producing at the rate of 20 barrels per day with a cut of 5 percent.

Within the last year several attempts have been made to develop production on neighboring properties. Well No. 2 on the E. L. Blanck property north of the El Dora was drilled to a depth of 1765 feet and was abandoned in January 1937 after failing to obtain production.

In May 1936, the Bankline Oil Company took over the La Blanc No. 8 well just south of the El Dora leases. This well had been drilled to a depth of 2417 feet by the Republic Petroleum Company in 1922. The 10-inch casing had been cemented at 2417 feet and had never been drilled out. The Bankline drilled out the cement and cored continuously from 2423 feet. [39] The Maricopa shale was encountered at 2910 feet and no oil was found in the upper 100 feet of the Maricopa. The only showings logged were from 2578-2583, 2596-2600m, 2749-2755, 2834-2836 and 2907-2909 feet. These showings were only present as 3-inch to 8-inch stringers of sand in the horizons listed. The company did not consider the showings sufficient to justify a production test and has *the* plugged the well with cement preparatory to abandonment.

The writers of this report do not believe that development of this property is justified.

DEEP ZONE PROSPECTS

Up to the present time, no well on the Thirty-five anticline has penetrated the Temblor and Vaqueros formations of lower Miocene age, which probably underlie the Maricopa shale. These formations include the principal producing zones of the Coalinga, Kettleman Hills and North Belridge oil fields.

The Standard Oil Company drilled a deep test on the Mascot property south of Taft. The well was

drilled to a depth of 9505 feet and penetrated most of the Temblor formation. The Temblor at this locality is reported to have been mostly shale with minor amounts of sand. It is apparently non-productive.

It is believed that the Temblor formation would be encountered below 8000 feet in the vicinity of the properties of the Lake View Oil and Refining Company. While the prospects of obtaining production from formations underlying the Maricopa in this area is not too bright, the writers consider that $100. [40] per acre is a fair speculative value for possible deep zone development under these leases.

ELK HILLS LEASE

The 360-acre Government lease on Section 8, T 31 S-R 25 E lies at the southeasterly end of the Elk Hills. This property is definitely outside the limits of the productive area of the present-known zones in the Elk Hills oil field. It is also too far northwest to have a chance of being included in the Buena Vista Lake gas field.

The Standard Oil Company drilled KCL No. 128 to a depth of around 8400 feet without reaching the Temblor formation. Apparently the producing horizon in the new Ten Sections oil field to the east is not present as an oil zone under Elk Hills. The Standard well was more favorably located, from a structural standpoint, than is the property of the Lake View Oil and Refining Company. This property is given a value of $25. per acre. [41]

LAKE VIEW OIL & REFINING COMPANY
(Past Production since January, 1930)

	Well No.	1930		1931		1932	1933		1934		1935	1936		1937 2 mos.	Totals	Per cent Cut	Gravity
Pentland	1	5407		6176		4430	4803		6165		4871	4489		570	35911	75	24.0°
	5	26686		14897		10326	4704		2645		2243	1803		318	63622	95	24.2°
	7	5396		4951		7235	6406		8801		7426	6364		1142	47721	82	24.1°
	13	6206		5166		5670	4486		2670		2589	2313		350	29450	92	24.3°
	17	3990	(8 mo.)	Shut Down											3990		
	19	29576		24871		25784	17491		14968		12765	10847		1965	136267	69	23.1°
International	3	7093	(8 mo.)	7183		4925	4605		4118		3394	2966		513	34797	95	23.4°
	4	6154	(8 mo.)	7303		4716	4737		6659		5238	5060		767	40634	69	23.3°
	5	5998	(8 mo.)	7341		4525	4554		7617		6897	6803		1058	44793	88	23.4°
	7	2885	(5 mo.)	5414		3785	4012		2973		3125	748	(4 mo.)	Shut Down	22942	75	23.1°
Midway Fields	6						44383	(10 mo.)	19484		7263	3379		215	74714	68	21.2°
	12	23243		20521		13817	8542		4923		4895	4803		482	81231	60	23.9°
	16	29286	(7 mo.)	32547		21170	14379		15138		16382	11107		1596	140605	86	23.8°
Pat Welch	44			12694	(10 mo.)	5014	3684		764	(3 mo.)	Shut Down				22156	90	23.0°
El Dora	6	7716		4674		4788	5759		6343		5388	4731		652	40051	75	22.8°
Totals		159641		152738		116185	132545		103268		81466	65413		9628	820884		

APPRAISAL OF UNDERGROUND RESERVES
LAKE VIEW OIL & REFINING COMPANY
AS OF APRIL 1, 1937

By Glen M. Ruby and A. A. Curtice.

	ESTIMATED GROSS FUTURE PRODUCTION OF OIL					ESTIMATED NET FUTURE PRODUCTION OF OIL				
Year	Pentland	International	Midway Fields	El Dora	Totals	Pentland	International	Midway Fields	El Dora	Totals
1	(3) 19490	(3) 13640	(3) 18600	(3) 13290	65020	17050	11840	16280	11630	56900
2	17700	(3) 12630	17010	12540	59880	15490	11050	14880	10970	52390
3	16190	(2) 9230	15610	11850	52880	14170	8080	13660	10370	46280
4	14900	8640	14440	11280	49260	13040	7560	12630	9870	43100
5	13830	8150	13410		35390	12100	7130	11730		30960
6	12900	7720	12510		33130	11290	6760	10950		29000
7	12090	7340	11770		31200	10580	6420	10300		27300
8	11390	7020	11050		29460	9970	6140	9670		25780
9	11730	6740	10440		27910	9390	5900	9140		24430
Totals	129220	81110	124840	48960	384130	113080	70980	109240	42840	336140

[43]

APPRAISAL OF UNDERGROUND RESERVES
LAKE VIEW OIL & REFINING COMPANY
AS OF APRIL 1, 1937

By Glen M. Ruby and A. A. Curtice.

	GROSS VALUE OF EXPECTED NET FUTURE PRODUCTION OF OIL					DEDUCTIONS			
Year	Pentland	International	Midway Fields	El Dora	Totals	Remedial Expense	Operating Expense	Net Value	Present Worth
1	$ 16130	$10980	$14590	$10120	$ 51820	$3000	$ 32400	$16420	$15660
2	14650	10170	13330	9540	47690		32400	15290	13260
3	13400	7430	12220	9020	42070		29700	12370	9750
4	12350	6960	11300	8590	39200		29700	9500	6810
5	11460	6560	10480		28500		21600	6900	4490
6	10700	6220	9760		26680		21600	5080	3010
7	10030	5910	9190		25130		21600	3530	1900
8	9460	5650	8630		23740		21600	2140	1050
9	8900	5430	8130		22460		21600	860	380
Totals	$107080	$65310	$97630	$37270	$307290	$3000	$232200	$72090	$56310

Present Worth of Underground Reserves of Producing Properties $56,310

[44]

MAP OF SE'LY PORTION OF
THIRTY-FIVE ANTICLINE
SHOWING DEVELOPMENT AS OF
APRIL 1 - 1937

31
Standard Oil Co. of California
Kerto

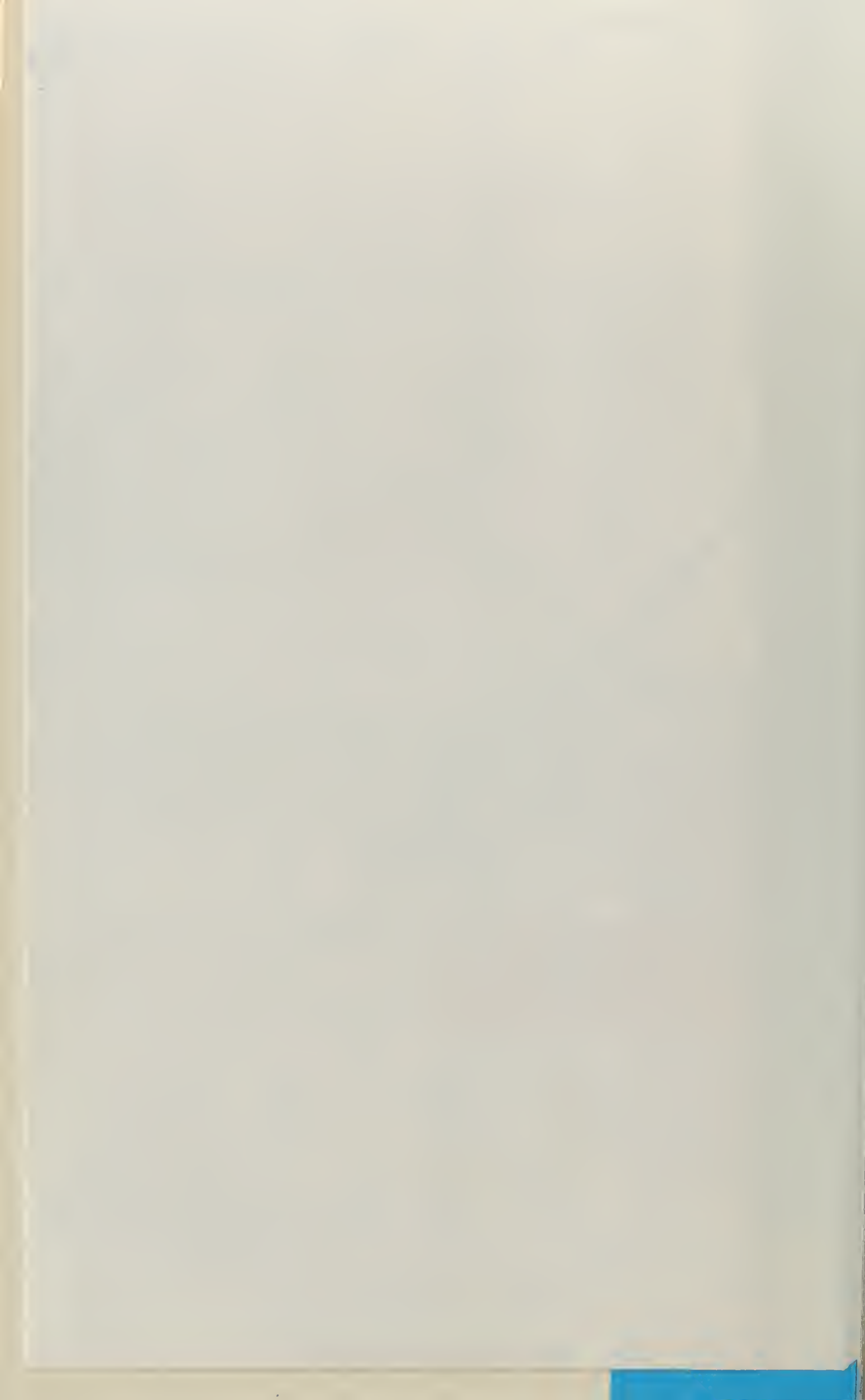
32
(Triangle) (U.S.L.)
(Transport)
(Crail)
United Oil Co. (U.S.L.)
(Son) (U.S.L.)
Gen. Pet. Corp. of Calif. (Midnorth) (U.S.L.)
The Texas Co. (U.S.L.)
Midlands Oilfields Ltd
Gen. Pet. Corp. of Cal. (Annex) (U.S.L.)
Lake View O. & R. Co. (U.S.L.)
Lew Suverkrop (U.S.L.)
Murvale Oil Co. (U.S.L.)
Assoc. Oil Co. (U.S.L.)
Gen. Pet. Corp. of Calif. (Pacific) (U.S.L.)
Obispo Oil Co (U.S.L.)

33
Standard Oil Co. of California

6
J. B. Kissinger Trustee (Easton)
E. L. Blanck & Chas. Munding
Mrs. W. E. Heasley
Bankline Oil Co.
Gen. Pet. Corp. of Calif. "B"
Lake View Oil & Refining Co. (U.S.L.)
Republic Pet. Co. Ltd
Gen. Pet. Corp. of Calif. "B"
Chief Oil Co
J. C. Theriot
G. P. Corp. of Cal. "B"
Gibson Oil Co. Inc.
Gibson Oil Co., Inc. (O'Brien)
"D" Gen. Pet. Corp. of Calif. (Main Line)
Michigan Oil Co

5
Standard Oil Co. of California

Lake View Oil & Ref. Co. (International)
(P.W.)
(Midway Fields) (U.S.L.)
Kyle & Davies
North American Oil Consolidated (U.S.L.)
Kneer - McPherson (U.S.L.)
(Jergins) (U.S.L.)
(Midway Fields)
Union Oil Co. of Calif. (U.S.L.)
(U.S.L.)
Empire Gas & Fuel Co. (Empire) (U.S.L.)
Transport Oil Co (U.S.L.)



MAP
of a portion of
THIRTY-FIVE ANTICLINE · SUNSET OIL FIELD
KERN COUNTY, CALIFORNIA
SHOWING
CONTOURS OF TOP OF TOP OIL SANDS

Accompanying Report of W. W. Copp, Deputy Supervisor & H. A. Godde, Engineer

CALIFORNIA STATE MINING BUREAU
R. D. BUSH
STATE OIL & GAS SUPERVISOR

Contour interval 100 feet

LEGEND

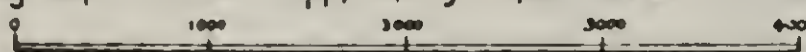
- Uncompleted - drilling
- Uncompleted - idle
- Uncompleted - abandoned
- Completed - producing
- Completed - idle
- Completed - abandoned
- Water
- Water - abandoned

Maricopa Northern
Trojan
Atlas
Maricopa Northern
Midway Northern
Midland Oilfield
Maricopa Oil Co.
32
33
Pacific Oil Co
Maricopa Star
Spreckels
General Pet.
(Annex)
El Dora
Trojan Oil Co.
Pacific Midway
Obispo
Atlas Oil
Miocene
R 23 W
T 12 N
T 11 N
Interstate
(P. Welch)
Kyle Dames
-1500
North American
Lakeview #2
Union
(International)
5
Pacific Oil Co
-2000
Lakeview #-2-
(Midway Fields)
(Jergins)
Calitroleum
-2500
Union
(Midway Fields)
(United Midway)
Transport Oil Co.

37

MAP
of a portion of
THIRTY-FIVE ANTICLINE · SUNSET OIL FIELD
KERN COUNTY CALIFORNIA
SHOWING
SUBSURFACE CONTOURS OF TOP OF KINSEY OIL SAND

Accompanying Report of W. W. Copp, Deputy Supervisor & H. A. Godde, Engineer



CALIFORNIA STATE MINING BUREAU
R. D. BUSH
STATE OIL & GAS SUPERVISOR

Contour interval 100 feet.

· LEGEND ·

- *Uncompleted – drilling*
- *Uncompleted – idle*
- *Uncompleted – abandoned*
- *Completed – producing*
- *Completed – idle*
- *Completed – abandoned*
- *Water*
- *Water – abandoned*

Maricopa Northern
Trojan
Atlas
Maricopa Northern
Maricopa Oil Co.
Midway Northern
Midland Oil field
32
33
Pacific Oil Co
Maricopa Star
Spreckels
General Pet. (Annex)
El Dora
Trojan Oil Co.
R 23 W
Pacific Midway
Obispo
Atlas Oil
Miocene
T 12 N
T 11 N
Interstate
(P. Welch)
Kyle James
North American
-1500
Lakeview #2
Union
(International)
-2000
5
Pacific Oil Co
Lakeview #2.
(Midway Fields)
(Jergins)
-2500
Calitroleum
Union
(Midway Fields)
(United Midway)
Transport Oil Co

38

MAP
of a portion of
THIRTY-FIVE ANTICLINE · SUNSET OIL FIELD
KERN COUNTY, CALIFORNIA

showing

SUBSURFACE CONTOURS OF TOP OF WILHELM OIL SANDS

Accompanying Report of W.W. Copp, Deputy Supervisor & H.A Godde, Engineer

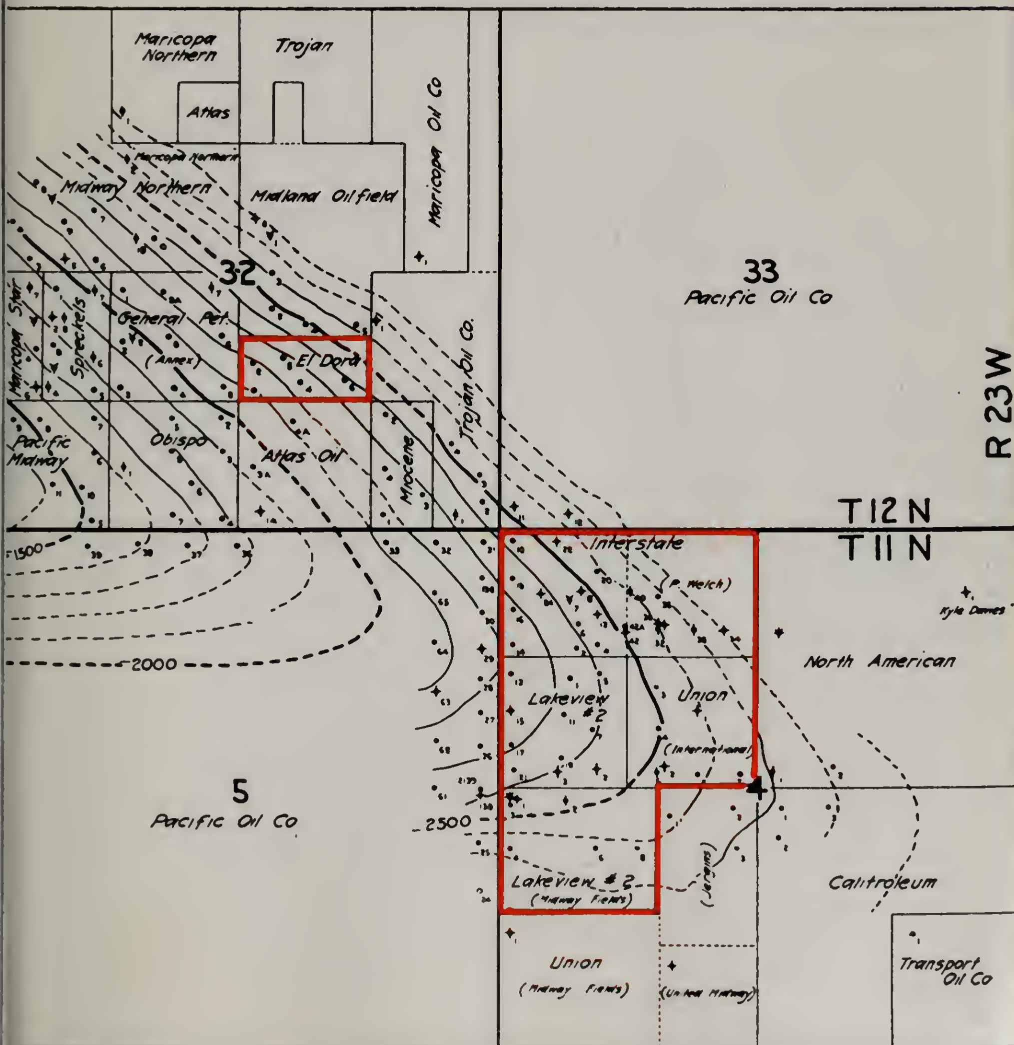
0 1000 2000 3000 4000 FT

CALIFORNIA STATE MINING BUREAU
R D BUSH
STATE OIL & GAS SUPERVISOR

Contour interval 100 feet

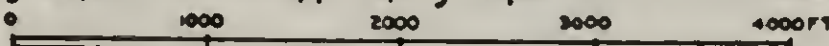
LEGEND

- Uncompleted - drilling
- Uncompleted - idle
- Uncompleted - abandoned
- Completed - producing
- Completed - idle
- Completed - abandoned
- Water
- Water - abandoned



MAP
of a portion of
THIRTY-FIVE ANTICLINE · SUNSET OIL FIELD
KERN COUNTY, CALIFORNIA.
SHOWING
SUBSURFACE CONTOURS OF TOP OF GUSHER OIL SANDS

Accompanying Report of W. W. Copp, Deputy Supervisor & H. A. Godde, Engineer



CALIFORNIA STATE MINING BUREAU
R. D. BUSH
STATE OIL & GAS SUPERVISOR

Contour interval 100 feet.

· LEGEND ·

- Uncompleted - drilling
- Uncompleted - idle
- Uncompleted - abandoned
- Completed - producing
- Completed - idle
- Completed - abandoned
- Water
- Water - abandoned

Maricopa Northern
Trojan
Atlas
Maricopa Northern
Midway Northern
Midland Oilfield
Maricopa Oil Co
32
33
Pacific Oil Co
General Pet.
El Dora
Trojan Oil Co.
Spreckels
Pacific Midway
Obispo
-2000
Atlas Oil
Miocene
R23W
T12N
T11N
Interstate
(P. Welch)
Kyle Dennes
North American
Lakeview #2
Union
(International)
5
Pacific Oil Co
-2500
Lakeview # 2.
(Midway Fields)
(Jergins)
Califroleum
-3000
Union
(Midway Fields)
(United Midway)
Transport Oil Co.

PLATE VI

MAP OF SOUTHEASTERN PORTION OF THIRTY-FIVE ANTICLINE SUNSET OIL FIELD KERN COUNTY

SHOWING

CONTOURS OF TOP OF MARICOPA SHALE

Accompanying Report by H. A. Godde and E. H. Musser

CALIFORNIA STATE MINING BUREAU

R. D. BUSH

STATE OIL & GAS SUPERVISOR

• LEGEND •

- ● Wells drilled into Maricopa Shale
- ◙ Wells producing from Maricopa Shale

Contour interval 100 feet

Datum, Sea level

SCALE

T12N R23W

T11N R23W

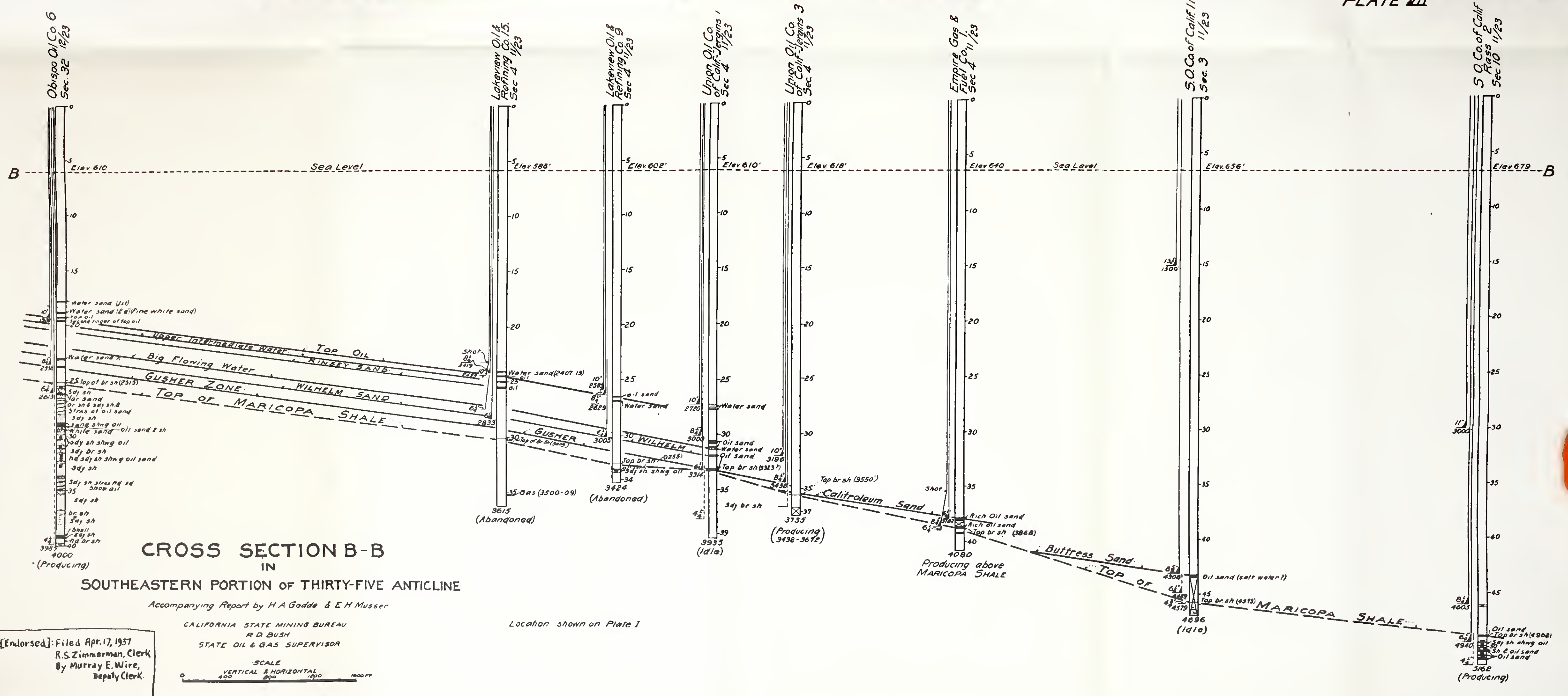


PLATE VIII
Obispo Oil Co 6
Sec. 32 12/23
Lakeview Oil & Refining Co 15.
Sec 4 11/23
Lakeview Oil & Refining Co 9
Sec 4 11/23
Union Oil Co of Calif.-Jergins 1
Sec 4 11/23
Union Oil Co of Calif.-Jergins 3
Sec 4 11/23
Empire Gas & Fuel Co 1
Sec 4 11/23
S.O. Co. of Calif. 11
Sec. 3 11/23
S.O. Co. of Calif Rass 2
Sec 10 11/23
B
Sea Level
B
Elev 610
Elev 588'
Elev 602'
Elev 610'
Elev 618'
Elev 640
Elev 656'
Elev 679
Upper Intermediate Water
Top Oil
Kinsey Sand
Big Flowing Water
Wilhelm Sand
Gusher Zone
Top of Maricopa Shale
Gusher
Wilhelm
Calitroleum Sand
Buttress Sand
Top of Maricopa Shale
Water sand (1st)
Water sand (2d) (fine white sand)
Top oil
Second finger of top oil
Top of br sh (2515)
Water sand (2407 13)
Oil sand
Water sand
Top br sh (3550')
Rich Oil sand
Top br sh (3868)
Oil sand (salt water?)
Top br sh (4513)
Top br sh (4902)
Gas (3500-09)
4000 (Producing)
3615 (Abandoned)
3424 (Abandoned)
3935 (Idle)
3735 (Producing) (3438-3672)
4080 Producing above Maricopa Shale
4696 (Idle)
5162 (Producing)
CROSS SECTION B-B
IN
SOUTHEASTERN PORTION OF THIRTY-FIVE ANTICLINE
Accompanying Report by H A Godde & E H Musser
CALIFORNIA STATE MINING BUREAU
R D BUSH
STATE OIL & GAS SUPERVISOR
Location shown on Plate I
SCALE
VERTICAL & HORIZONTAL
0 400 800 1200 1600 FT
[Endorsed]: Filed Apr. 17, 1937
R. S. Zimmerman, Clerk
By Murray E. Wire,
Deputy Clerk.

AUDIT
of
THOMSON, COOPER & THOMSON
May 8, 1931 to May 1, 1938.

PAUL J. HISEY, RECEIVER FOR
LAKE VIEW OIL AND REFINING
COMPANY

Los Angeles—April 30, 1938 [60]

June Third, 1938

Mr. B. J. Bradner, Receiver for
Lake View Oil and Refining Company
Los Angeles, California

Dear Sir:

We have examined the accounts of Paul J. Hisey, Receiver for the Lake View Oil and Refining Company for the twelve months ended April 30, 1938. This report with previous annual reports covers the period of approximately seven years from May 8, 1931 to April 30, 1938.

HISTORY

Effective May 8, 1931, Paul J. Hisey was appointed Receiver for the Lake View Oil and Refining Company, by the District Court of the United States. The accounts of the Receiver were established in accordance with an audit report made as of May 7, 1931, which was based on the appraised value of the Assets and the total of the

accepted Liabilities of the Company as at that date.

Paul J. Hisey died April 27, 1938 and B. J. Bradner was appointed Receiver by the court on April 29, 1938. The new Receiver took over the financial affairs of the institution as of April 30, 1938.

CURRENT FINANCIAL CONDITION

The current financial condition of the Receivership at April 30, 1938, subject to further court decisions, is summarized as follows:

Current Assets		
Cash on Hand and on Deposit	46,699.22	
Less: Current Liabilities of Receiver	13,312.04	
Net		33,387.18
Accounts Receivable	11,934.31	
Crude Oil and Refinery Products in Storage	8,705.59	
		20,639.90
Total		54,027.06
Liabilities of Lake View Oil and Refining Company		
Total stated as at May 7, 1931		341,930.63
Additional Claims allowed		16,175.61
		358,106.24
Payments made on Preferred Claims	57,841.11	
Less Payment Returned	1,949.77	
	55,891.34	
Claims cancelled, adjusted or offset against Receivables	2,664.99	
		58,556.33
		299,549.91

Payments out of Midway Fields Lease Production, made to Trustee for Guarantors on Notes Payable	50,000.00	
Payments on Acceptances of Sunland Refining Corporation, made by the Receiver for that Company direct to the holders of the Discounted Acceptances	10,123.85	
Dividends to General Creditors November, 1936, and September, 1937	26,059.50	
		86,183.35
Total—April 30, 1938		213,366.56

[61]

The total of the general claims as stated above includes an amount of $10,000.00 representing claims recently allowed as due to H. H. Bell, $6,000.00 and G. L. Aynesworth $4,000.00. These claims were allowed in settlement of a claim made by J. L. Coats.

Contingent Liabilities Not Included Above

The Current Liabilities of the Receiver as stated above do not include an amount of $78,034.49 which represents the Contingent Joint Venture interest of John H. Fisher in the production from certain wells. The payment of this amount has been disallowed by decision of the United States Circuit Court of Appeals, and it has been recorded as a liability held in suspense pending final settlement with other creditors.

A lessor's claim, recently filed, for additional royalty in the amount of $5,149.68 covering a pe-

riod from 1928 to 1938 has not yet been investigated and has not been accepted or approved.

Contingent Liabilities are further commented upon in a subsequent section of this report.

RESULT OF OPERATIONS

The operations of the Receiver for the period of approximately seven years ended April 30, 1938 have resulted in a Net Revenue of $181,339.59 before providing for Receiver's Fees, Depreciation, Depletion or Joint Venture Expense.

Allowances to the Receiver against his ultimate fee through a drawing account, have not been included in the operating results shown above. The amount of the ultimate fee has not been determined and the amount of the drawing account as allowed by the Court has been charged directly to the Receivership Capital Account.

RECEIVERSHIP CAPITAL

The Receivership Capital, being the excess of Assets at appraised values over accepted Liabilities at May 7, 1931 was $1,028,311.48.

This amount has been increased by the Net Revenue as stated in the preceding section of this report $181,339.59 and has been reduced by net adjustments on old Accounts and additional claims $3,273.32, charges for Receiver's Drawing Account $28,094.92, Depreciation and Depletion $264,438.59, and Contingent Joint Venture Expense $78,034.49,

leaving a Receivership Capital at April 30, 1938 of $835,809.75.

A further analysis of the Receivership Capital Account follows:

Capital Stock Outstanding May 7, 1931 (991,286 Shares)		600,694.76
Capital Surplus from Appreciation of Leaseholds		2,069,700.91
		2,670,395.67
Operating Deficit—May 7, 1931		431,339.72
Total Recorded Capital—May 7, 1931		2,239,055.95
Reduction in Appreciated Value of Leaseholds	1,140,000.00	
Net reduction in Valuation of Plant and Equipment and Accounts Receivable and Payable	70,744.47	
		1,210,744.47
Adjusted Capital Account—May 8, 1931		1,028,311.48

[62]

Additional Losses on Accounts and Additional Claims Allowed	20,079.21	
Collections and Adjustments on Old Accounts	16,805.89	
	3,273.32	
Depreciation, Depletion and Joint Venture Expense May 8, 1931, to April 30, 1938	342,473.08	
		345,746.40
		682,565.08

Operating Revenue (Exclusive of above items) May 8, 1931, to April 30, 1938	181,339.59	
Less: Receiver's Drawing Account	28,094.92	
		153,244.67
Receivership Capital—April 30, 1938		835,809.75

SCOPE OF EXAMINATION

Our examinations have not constituted complete detailed audits, but have been sufficiently comprehensive to satisfy us as to the substantial accuracy of the Receiver's general accounts.

The records of Receipts and Disbursements have been carefully reviewed and with the exception of minor items all supporting vouchers and invoices have been inspected. Comprehensive tests have been made of the compilation of the record of products produced, purchased and disposed of and some few tests have been made of the supporting records submitted by the field office.

The following comments amplify certain items appearing on the accompanying Balance Sheet, Schedule A, and will serve to further indicate the scope of the examination.

Except as specifically stated in this report, debtors and creditors have not been requested to confirm the balances in their accounts.

CASH AND BANK ACCOUNTS

The Revolving Fund of $19.34 in the General Office was counted.

Bank balances, including Payroll, Petty Cash revolving funds, General Commercial Accounts and Dividend account, totaling $46,679.88, were reconciled with the amounts shown on the banks' statements which were confirmed by certificates from the depositaries.

Recorded Cash Receipts have been deposited in Banks and Disbursements were evidenced by paid checks and/or vouchers on file.

The record of Disbursements has been carefully reviewed and in our opinion all expenditures have been for proper purposes.

ACCOUNTS AND NOTE RECEIVABLE—RECEIVER

The Accounts Receivable of the Receiver, which were considered good and collectible at April 30, 1938, amounted to $11,934.31. [63]

A summary of these accounts as to date of billing follows:

Date of Billing	Amount
April 1938	$10,466.17
March 1938	1,084.90
February 1938	138.30
January 1938	244.94
	$11,934.31

During May 1938 and prior to the completion of this report $11,530.60 had been collected, including all items dating prior to April.

ACCOUNTS AND ACCEPTANCES RECEIVABLE—LAKE VIEW OIL AND REFINING COMPANY

Accounts and Notes Receivable of the Lake View Oil and Refining Company, considered good at May 7, 1931 amounted to $20,251.91. All these items have been collected with the exception of one Note for $500.00, which was later transferred to Doubtful Accounts.

Accounts and Acceptances considered doubtful at May 7, 1931 totaled $55,604.80. This amount has been increased by one Note previously considered good, $500.00, and has been reduced by collections and credits on old accounts $15,470.46 and the elimination of $734.81 considered to be definitely uncollectible, leaving a total of $39,899.53 in Doubtful Accounts and Acceptances due to the Lake View Oil and Refining Company at April 30, 1938.

The Doubtful Accounts and Acceptances include items due from the Sunland Refining Corporation, which has been in the hands of a receiver since 1931. The amount originally due from this Company at May 7, 1931 was $52,574.77, which amount has been reduced by dividends aggregating $14,575.99, leaving an uncollected balance at April 30, 1938 of $37,998.78.

The Receiver for the Sunland Refining Corporation has proposed to make a payment of 25% of the remaining balance in final settlement. This proposal has been accepted by the Receiver for the Lake View Oil and Refining Company with the approval of the Court and subject to acceptance by other creditors of the Sunland Refining Corporation.

Since it does not appear possible to determine definitely what further amounts will be realized on these doubtful items at least within a reasonable time, a provision for possible loss of the entire amount of $39,899.53 has been made, and they have not been included among the Net Assets of the Receiver.

INVENTORIES

Refinery Products and Crude Oil in storage at April 30, 1938 amounted to $8,705.59. Quantities shown on the inventory were accepted as compiled by the field office. Refined products are priced at approximately ten per cent below recent selling prices, and Crude Oil is priced at listed field prices.

Tests made of gauge tickets and field office reports indicate that all products purchased and produced have been properly accounted for.

UNITED STATES GOVERNMENT BONDS

United States Bonds to the par value of $13,000.00 are on deposit with the Fidelity and Deposit Company of Maryland as collateral in con-

nection with Surety Bonds issued to guarantee payment of Current Gasoline Taxes and Government Royalty. These securities are shown at cost of $13,-281.88, which is less than the approximate market value at April 30, 1938. This deposit was verified by direct communication from the office of the surety company. [64]

DEFERRED ACCOUNTS AND EXPENSES

An Account Receivable amounting to $5,640.27 was reduced to judgment in the latter part of April 1938.

Unexpired Insurance Premiums, $1,111.30, and Deferred Taxes, $3,739.14, are believed to be correctly stated. An actual Inventory of Supplies was not available and the amount of $1,150.00 recorded as being the estimated value of supplies constantly on hand has not been adjusted.

PROPERTY

Physical Property, including derricks, casing, tools, tanks, boilers, pipe lines, buildings, refinery and other equipment, Automobiles and Trucks and Office Equipment was valued as of May 7, 1931 at $147,325.00 in accordance with an independent engineer's report. Net additions during the period of Receivership amounted to $2,864.00, resulting in a total at April 30, 1938 of $150,189.00.

The principal items of additions to property during the period consisted of the replacement of old Automobile Trucks, the construction of a retort

still in the refinery and the purchase and erection of a fractionator tower.

The total cost of additions was reduced by the disposition of old equipment.

The physical property has not been inspected by us.

PROVISION FOR DEPRECIATION

Provision has been made for depreciation of Physical Property in the amount of $126,960.31, which has been computed at an average annual rate of 24% on Automobiles and Trucks and 12% on other property.

LEASEHOLDS—APPRAISED VALUE

Leaseholds which are stated at appraised values as of May 7, 1931, less depletion or amortization based on the number of barrels of oil produced during the period May 8, 1931 to April 30, 1938, are listed below:

Description	Net Valuation May 7, 1931	Depletion or Amortization May 8, 1931, to April 30, 1938	Net Valuation April 30, 1938
Pentland	283,148.53	98,098.77	185,049.76
Pentland-Interstate	226,022.00		226,022.00
Union International	215,352.08	2,335.96	213,016.12
Pat Welch	52,620.25	3,834.61	48,785.64
Elk Hills (Not producing)	72,000.00		72,000.00
Midway Fields	86,375.47	14,858.72	71,516.75
El Dora	224,908.39	16,333.22	208,575.17
Total	1,160,426.72	135,461.28	1,024,965.44

The net valuations as at May 7, 1931 represent appraised valuations previously reported by geologists, less depletion computed to May 7, 1931.

The lessor of the Pentland, Pentland Interstate, Union International and Pat Welch Leases served notice on the Receiver that the drilling requirements provided for in the lease agreement had not been carried out. We are informed that the lessor has been restrained from enforcing forfeiture of the lease, by decision in the Federal Courts.

The Midway Fields Lease was assigned prior to the Receivership to a Trustee as partial security for the payment of Notes, Discounted Acceptances and Interest Payable to the amount of $50,000.00. In accordance with an order from the Court, payments to the amount of $50,000.00 have been made to the Trustee out of the proceeds from a portion of the oil produced on this lease, and the assignment has been released by the Trustee. [65]

LIABILITIES OF RECEIVER

Accounts Payable by the Receiver totaled $6,-356.46 at April 30, 1938 and represented the liability for current purchases of materials, supplies and services.

Accrued Payroll covering the last half of the month of April 1938 totaled $1,160.45. Royalties based on the recorded production for the month of April 1938 amounted to $633.82.

Taxes Payable totaling $5,025.67 included the following items:

State Gasoline Tax (for last week of April, 1938)	1,494.75
Federal Gasoline, Pipe Line and Production Tax (for the month of April, 1938)	21.43
Kern County Taxes on property and leasehold interests (for 1938-39)	3,205.23
State Sales Tax (for month of April, 1938)	109.58
State and Federal Payroll Taxes (to and including April 30, 1938)	194.68
	5,025.67

Dividends amounting to $135.64 allocated to certain general creditors have not yet been paid and are withheld pending the settlement of liens. Cash funds to cover these dividends are on deposit in a separate bank account.

Insofar as ascertainable all known Liabilities of the Receiver at April 30, 1938 have been recorded and are included in this report.

LIABILITIES OF LAKE VIEW OIL AND REFINING COMPANY

General unsecured claims as accepted by the Receiver and remaining unpaid at April 30, 1938 aggregated $213,366.56. Certain of these claims are subject to further comment.

Claims of sundry creditors, including Accounts, Notes and Acceptances and Acceptances Receivable Discounted, totaled $66,898.73 at April 30, 1938.

Past due Notes and Discounted Acceptances Payable to the Citizens National Trust and Savings

Bank, with interest accrued totaled $74,251.29 at May 7, 1931, and were partially secured by assignment of the Midway Fields Lease to a Trustee for the guarantors who guaranteed payment to the Bank up to the amount of $50,000.00 In accordance with orders of the Court the net proceeds from a certain proportion of the oil produced on the Midway Fields Lease to the full amount of $50,000.00 has been paid to the Trustee, and has been paid by the Trustee to the Bank to apply on these loans. The payment of this amount, the payment of dividends in November 1936 and September 1937 amounting to $6,682.61 and payments totaling $9,-436.35 made direct to the bank by the Receiver for the Sunland Refining Corporation, to apply on Discounted Acceptances, have reduced the total of these obligations to the Bank at April 30, 1938 to $8,-132.33.

Payments applied on this account as stated above have been computed from records in the Receiver's office. Confirmation of the receipt of the payments and of the amount of the remaining balance was requested but was not received from this creditor. The amount of $9,436.35 recorded as having been paid to apply on Discounted Acceptances has been verified by direct communication from the Receiver for the Sunland Refining Corporation.

A Note Payable to the Bank of America, with interest thereon, amounted to $141,028.02 at May 7, 1931. The payment in November 1936 and September 1937 of dividends amounting to $12,692.52

reduced the balance on this Note at April 30, 1938 to $128,335.50. [66]

We have been informed that additional payments have been made to the Citizens National Trust and Savings Bank and to the Bank of America by other guarantors. Such payments are not of record in the accounts of the Receiver and are not considered in this report.

A judgment was rendered against the Receiver in the case of J. L. Coats' suit for alleged breach of contract. This judgment was reversed in the Appelate Court. In settlement of the claim of J. L. Coats and by court order, additional general claims were allowed in the amount of $6,000.00 in favor of H. H. Bell and $4,000.00 in favor of G. L. Aynesworth. The sum of these two claims, $10,000.00, has been included in the total of the general claims as stated on the attached Balance Sheet.

During 1936 by court decision the amount of $34,142.99 due the State of California for Gasoline Taxes at May 7, 1931, together with a 10% penalty of $3,414.29 was determined to be a preferential claim. The total amount of $37,557.28 has been paid in full by the Receiver.

Interest which may have accrued subsequent to May 7, 1931 on any of the above obligations has not been computed and is not included in this report.

LIABILITIES OF THE RECEIVER—HELD IN SUSPENSE

An amount of $78,034.49 has been recorded as being the amount claimed by John H. Fisher to accrue to him from the proceeds of the oil produced from certain wells under the terms of Joint Venture Agreements. The right of Mr. Fisher to share in the oil produced has been disallowed by the United States Circuit Court of Appeals until other creditors are paid and the above amount is shown in this report as a Liability held in suspense pending a final settlement of other creditors' claims.

By order of the District Court and prior to the decision of the Court of Appeals there has been paid to Mr. Fisher the sum of $4,339.45, being approximately one-half the amount called for under the terms of the Joint Venture Agreements. Of this amount $1,949.77 accrued prior to May 7, 1931 and $2,389.68 accrued subsequent to that date. The total of $4,339.45 has been repaid to the Receiver by Mr. Fisher, and he has filed a claim as a general creditor for the full amount of $3,985.46 which accrued to him prior to May 7, 1931. Through the payment in November 1936 and September 1937 of dividends amounting to $358.69, the claim by Mr. Fisher as a general creditor has been reduced to $3,626.77.

CONTINGENT LIABILITIES

The following Contingent Liabilities existed which are not included in the attached Balance Sheet, Schedule A.

A Joint Venture interest in the oil to be produced from certain wells is claimed by John H. Fisher. The total sum which may become payable to Mr. Fisher, after other creditors have been paid and providing sufficient oil is produced from the specific wells, amounted to $203,015.18 at April 30, 1938. This sum is in addition to the amount of $78,034.49 which is included in this report as a Liability held in suspense. The United States Circuit Court of Appeals has denied Mr. Fisher's right to share in the oil to be produced until after creditors are paid and therefor the total obligation is suspended pending final settlement of other creditors' claims.

Subsequent to April 30, 1938, but prior to the completion of this report a claim for additional royalty and interest thereon totaling $5,149.68 and covering a period of approximately ten years was filed with the Receiver. This claim is under investigation and has not yet been allowed or approved.

CERTIFICATE

In our opinion, subject to the foregoing comments, the attached Balance Sheet, Schedule A, and Statement of Revenues and Expenses, Schedules B and C, correctly reflect respectively the financial condition at April 30, 1938 and the results of operations for the period of approximately seven years ended on that date of Paul J. Hisey, Receiver for the Lake View Oil and Refining Company. [67]

The accounts of the Receiver have been maintained in good order and according to sound accounting practice. The accounts were established under our supervision as of May 8, 1931 and they have been reviewed by us annually since that date.

Based on our annual examinations, the extent of which is indicated in the foregoing comments, and on our knowledge of the individual and his business methods, it is our opinion that the affairs of the Receivership have been honestly and faithfully administered and that its assets have been properly accounted for by the deceased Receiver, Paul J. Hisey.

For your further information we attach the following schedules:

A—Balance Sheet..........April 30, 1938

B—Revenues and Expenses..........
..........May 8, 1931 to April 30, 1938

C—Crude Oil Cost of Refinery Products—
Operating and General Expenses..........
..........May 8, 1931 to April 30, 1938.

Respectfully submitted,
THOMSON, COOPER & THOMSON,
By H. M. THOMSON,
Certified Public Accountant.

[68]

SCHEDULE A

PAUL J. HISEY, RECEIVER FOR LAKE VIEW OIL AND REFINING COMPANY

Los Angeles

BALANCE SHEET, APRIL 30, 1938

ASSETS

Cash and Bank Accounts		
Office Cash	19.34	
Bank of America—Maricopa	805.90	
Citizens National Trust and Savings Bank	45,738.34	
Citizens National Trust and Savings Bank Dividend Account (Contra)	135.64	
		46,699.22
Receivables		
Accounts Receivable of Receiver—Current		11,934.31
Accounts and Acceptances—Dating prior to May 8, 1931—Doubtful	39,899.53	
Provision for Losses	39,899.53	
Inventories		
Refined Products	5,477.55	
Crude Oil	3,228.04	
		8,705.59
Total Current Assets		67,339.12
United States Government Bonds (at Cost)		13,281.88
(Deposited as collateral in connection with Surety Bonds to secure payment of Gasoline Tax and Government Royalty)		

Deferred Accounts and Expenses		
Account Receivable—Deferred	5,640.27	
Unexpired Insurance Premiums	1,111.30	
Deferred Taxes	3,739.14	
Material and Supplies (estimated)	1,150.00	
Meter Deposit	67.00	
		11,707.71
Property		
Plant and Equipment	146,288.80	
Automobiles and Trucks	3,260.20	
Equipment—General Office	640.00	
	150,189.00	
Provision for Depreciation	126,960.31	
		23,228.69
Leaseholds		
Leaseholds—Cost	265,413.28	
Leaseholds—Appreciation	1,237,865.20	
	1,503,278.48	
Provision for Depletion	478,313.04	
		1,024,965.44
		1,140,522.84

LIABILITIES

Current Liabilities of Receiver		
Accounts Payable	6,356.46	
Accrued Payroll	1,160.45	
Royalties Payable	633.82	
Taxes Payable	5,025.67	
Dividends Withheld (Contra)	135.64	
		13,312.04
Liabilities of Lake View Oil and Refining Company (General Unsecured Claims as Accepted by Receiver)		
Accounts Payable	52,923.04	

Notes, Acceptances and Interest	12,898.23	
Discounted Acceptances	1,077.46	
	66,898.73	
Citizens National Trust and Savings Bank		
Discounted Acceptances and Interest	8,132.33	
Bank of America		
Note Payable and Interest	128,335.50	
H. H. Bell and G. L. Aynesworth	10,000.00	
		213,366.56
		226,678.60
Liability in Suspense		
John H. Fisher Joint Venture Agreements		78,034.49
(Deferred by Court Order until general claims are liquidated)		
Receivership Capital (Schedule B)		835,809.75
		1,140,522.84

Note: Certain Contingent Liabilities exist which are not included above but are described on Page 7 of the attached report.

This Balance Sheet is part of a report dated June 3, 1938, prepared by Thomson, Cooper & Thomson, Certified Public Accountants, and is to be considered in connection therewith.

[69]

SCHEDULE B

PAUL J. HISEY, RECEIVER FOR LAVE VIEW OIL AND REFINING COMPANY

Los Angeles

REVENUES AND EXPENSES, MAY 7, 1931 TO APRIL 30, 1938

Sales—Refinery Products	2,431,188.16	
Less: Gasoline Taxes	668,890.35	
		1,762,297.81
Crude Oil Produced—Net (At Market)		502,072.38
Gross Revenue		2,264,370.19
Cost of Products Sold		
Refinery Products in Storage May 7, 1931	24,974.92	
Crude Oil Cost of Refinery Products (Schedule C)	1,383,327.39	
Operating Expenses (Schedule C)	486,732.10	
Royalty	66,266.35	
Cost of Motor Oil Purchased and Sold	1,305.91	
	1,962,606.67	
Refinery Products in Storage — April 30, 1938	5,477.55	
Total Cost of Products Sold		1,957,129.12
Gross Profit		307,241.07
General Expenses (Schedule C)		137,099.00
Operating Profit		170,142.07

Other Income		
Rentals—El Dora Surface Rights	3,800.00	
Rentals—Cottages	1,885.00	
Discount and Interest Earned	3,892.97	
Miscellaneous	2,015.22	
	11,593.19	
Interest Paid	45.59	
Net Other Income		11,547.60
Net Profit		181,689.67
Federal Income Tax—1933		350.08
Net Revenues (Before providing for Receiver's Fees, Depreciation, Depletion or Joint Venture Expense)		181,339.59
Receivership Capital		
Balance May 7, 1931		1,028,311.48
Deduct: Additional Claims allowed and losses on accounts dating prior to Receivership	20,079.21	
Less: Collections and adjustments on accounts dating prior to Receivership	16,805.89	
		3,273.32
		1,025,038.16
Net Revenue (Above)	181,339.59	
Less: Receiver's Drawing Account	28,094.92	
		153,244.67
		1,178,282.83
Deduct: Depreciation	128,977.31	
Depletion of Leaseholds	135,461.28	
Joint Venture Expense	78,034.49	
		342,473.08
Balance—April 30, 1938 (Schedule A)		835,809.75

SCHEDULE C

PAUL J. HISEY, RECEIVER FOR LAVE VIEW OIL AND REFINING COMPANY

Los Angeles

CRUDE OIL COST OF REFINERY PRODUCTS—OPERATING AND GENERAL EXPENSES, MAY 7, 1931 TO APRIL 30, 1938.

Crude Oil Cost of Refinery Products		
Crude Oil in Storage—May 7, 1931	1,758.79	
Production (At Market)	502,072.38	
Purchases—Crude Oil and Casing-head Gasoline	882,724.26	
	1,386,555.43	
Crude Oil in Storage—April 30, 1938	3,228.04	
Total (Schedule B)		1,383,327.39
Operating Expenses		
Superintendent	4,413.36	
Lease Expense	44,721.11	
Oil Well Expense	89,801.80	
Oil and Pumping	52,121.80	
Buildings	4,117.53	
Pipe Lines	13,889.72	
Tanks	999.59	
Tools and Shop	4,219.67	
Dehydrator	3,182.75	
Warehouse Repairs	27.00	
Power and Boiler Plant	23,776.22	
Automobiles, Trucks and Outside Hauling	51,644.04	
Refinery—Labor and Supplies	125,924.28	
Laboratory	7,808.13	
Insurance	17,868.06	
Taxes	42,217.04	
Total (Schedule B)		486,732.10

General Expenses		
Special Attorney's Fees and Expenses for Bank of America in Fisher Joint Venture Case	3,308.74	
Special Attorney's Fees and Expenses at Fresno in Coats Suit for Breach of Contract	2,147.90	
Sundry Special Legal Expenses	1,122.88	
Attorney for Stockholders	500.00	
Attorney for Receiver—Fees and Expenses	22,428.61	
Auditing and Accounting Service	5,955.00	
Appraisal Fees	1,500.00	
Geological Fees	1,825.00	
Traveling	5,608.07	
Office Salaries	16,429.10	
Printing and Stationery	1,623.57	
Field Office	22,918.26	
Telephone and Telegraph	7,183.48	
Postage and Revenue Stamps	1,420.72	
General Office Expense	22,490.07	
Losses on Accounts	1,441.30	
Sales Expense	19,019.29	
Prepaid Freight	177.01	
Total (Schedule B)		137,099.00

[71]

[Endorsed]: Filed June 7, 1938. R. S. Zimmerman, Clerk. By R. B. Clifton, Deputy Clerk. [72]

[Title of District Court and Cause.]

ORDER APPROVING AUDIT OF THOMPSON, COOPER & THOMSON, DATED APRIL 30, 1938, AND APPROVING ACCOUNTING OF PAUL J. HISEY, RECEIVER, DECEASED, AND EXONERATION OF BONDSMEN.

The matter of the petition of the Receiver herein for an order approving audit of Thomson, Cooper & Thomson, dated April 30, 1938, and acts of Receiver came on regularly to be heard on the 3rd day of October, 1938, notice of hearing on said petition having been regularly and properly given to those interested, and the Citizens National Trust and Savings Bank of Los Angeles having made its objections, and the said Paul J. Hisey, Receiver, having died on the 27th day of April, 1938, and no other persons appearing to object to said petition, the Receiver B. J. Bradner appearing by his attorney Jerold E. Weil, and the said Citizens National Trust and Savings Bank of Los Angeles by its attorneys Messrs. Cosgrove & O'Neil by Frank B. Yoakum, Jr.;

It Is Hereby Ordered and Decreed that the audit of Thomson, Cooper & Thomson, dated April 30, 1938, and that the acts of the Receiver therein set forth be and the same are hereby approved, without prejudice, however, to the contentions of the said Citizens National Trust and Savings Bank

of Los Angeles raised by its objections as to the amount of the unpaid balance of said bank against the receivership estate, the accounts of Paul J. Hisey, Deceased, as Receiver are approved, and the sureties on his bond as such Receiver be and they are hereby exonerated.

Dated this 10 day of October, 1938.

WM. P. JAMES,
Judge of the United States District Court. [73]

Approved as to form as provided in Rule 44:

COSGROVE & O'NEIL,
By F. B. YOAKUM, Jr.,
Attorneys for Objector Citizens National Trust and Savings Bank of Los Angeles.

[Endorsed]: Filed Oct. 10, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [74]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SELL THE LEASES AND THE PERSONAL PROPERTY LOCATED THEREON.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Central Division:

The petition of B. J. Bradner, as Receiver for Lake View Oil and Refining Company, a corpora-

tion, respectfully shows and represents to this Honorable Court as follows:

I.

That under decree of the Court herein granted and entered on the 29th day of April, 1938, he was duly appointed Receiver herein, and that subsequently he duly executed and filed a bond required to be filed by him under the terms and conditions of said decree, and entered upon his duties as Receiver herein and is now acting as such.

II.

Your petitioner respectfully shows that Paul J. Hisey was appointed Receiver upon the 8th day of May, 1931, and qualified and acted as such until the appointment of your petitioner herein, and that the said Paul J. Hisey during the time he acted as Receiver filed annual reports, and that after the death of said Paul J. Hisey and appointment of petitioner herein, a report was filed by your petitioner, as Receiver, and that said report was ratified and approved by this court on the 5th day of October, 1938. [75]

III.

That the said Paul J. Hisey and petitioner herein has worked almost continuously since 1931 in an endeavor to handle the assets of the creditors in such manner and in such way as may be most beneficial to the creditors and stockholders of said

corporation. That your petitioner, as attorney and as Receiver, has endeavored throughout to sell the assets in the hands of your petitioner at an advantageous price for cash, and that your petitioner has received an offer from W. L. Adkisson to purchase the leases in Kern County and the personal property and equipment located thereon, excepting therefrom the oil and oil products that may be on hand at time of delivery for the sum of Seventy-five Thousand Dollars ($75,000.00), and that said W. L. Adkisson has deposited with your petitioner ten per cent (10%) of said purchase price, to wit, the sum of Seven Thousand Five Hundred Dollars ($7,500.00); that an original copy of said offer is hereto attached marked "Exhibit A" and made a part hereof.

IV.

That the oil leases now owned by the receivership estate and in possession of your petitioner, as Receiver, are described and set forth in said "Exhibit A" hereto attached and made a part hereof, and the said "Exhibit A" includes the personal property located on said leases, excepting therefrom whatever oil and oil products may be in possession of your petitioner at the date of delivery.

V.

That said offer by W. L. Adkisson is by far the best offer that has been made to your petitioner

and the most advantageous one that your petitioner has been able to obtain.

Wherefore, petitioner prays that after such notice as the court may require, the Receiver, as petitioner herein, be authorized to sell, assign, transfer, set over, and convey to [76] W. L. Adkisson, all the right, title and interest of the Lake View Oil and Refining Company in and to the hereinbefore described premises and equipment, under the terms and conditions herein set forth in "Exhibit A" hereto attached, and for such other and further orders as to the court shall seem meet and just.

B. J. BRADNER,
Petitioner, Receiver for the Lake View Oil and Refining Company.
BRADNER & WEIL,
By JEROLD E. WEIL,
Attorneys for Receiver.

State of California
County of Los Angeles—ss.

B. J. Bradner, being by me first duly sworn, deposes and says:

That he is the Receiver in the above entitled action and the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are there-

in stated upon his information or belief, and as to those matters that he believes it to be true.

B. J. BRADNER.

Subscribed and sworn to before me this 19 day of October, 1938.

[Seal] ANNABEL SMITH,

Notary Public in and for said County and State.

[77]

EXHIBIT "A"

Los Angeles, California
October 18, 1938

To B. J. Bradner, Receiver for Lake View Oil and Refining Company:

Dear Sir:

I, the undersigned, will pay you the sum of Seventy-five Thousand Dollars ($75,000.00) for all of the leases located in Kern County, California, together with all the personal property and equipment located thereon and therein. The property to be purchased by me is described as follows, to-wit:

(1) Pentland lease.

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, a widow, as lessor, and Lake View Oil and Refining Company, a corporation, as lessee, covering the premises described as follows, to-wit:

The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west,

S. B. B. & M., Kern County, California, containing one hundred sixty (160) acres, more or less; which includes producing wells located thereon;

That the Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery, derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells.

(2) 1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a corporation, lessee, same being Los Angeles Serial No. 033378, covering land described as follows:

The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern county, California;

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of [78] El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that there is personal property located on said lease consisting of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that upon transfer of title said lease is subject to the approval of the Department of the Interior.

(3) 2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

> Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern county, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith,

trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior. No personal property is located on said lease.

(4) Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Visalia 09704, and also known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee, which company's name was changed to Lake View Oil and Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern county, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of annual rental effective June 1, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior. No personal property is located on said lease.

(5) Midway Field Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Los Angeles 033396a, and Midway Field Oil Company, a corporation, as lessee, covering [79] the following described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter (SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's

name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921, that there is personal property located thereon consisting of derricks, rigs, casing, machinery, equipment, tools and appliances; that upon transfer of title said lease is subject to the approval of the Department of the Interior.

Said leases are subject to all the terms, conditions and provisions therein contained.

Ten per cent (10%) or Seventy-five Hundred Dollars ($7500.00) of this bid to be paid upon acceptance thereof by the Receiver for the Lake View Oil and Refining Company and the balance to be paid upon confirmation of sale by the United States District Court for the Southern District of California, Central Division.

If this proposition is acceptable to you, will you please petition the court for an Order of Sale and hold a sale as promptly as possible in compliance with the United States Statute and thereafter secure a confirmation of sale. Upon confirmation of sale the balance of the purchase price is to be paid in escrow through the Title Insurance and Trust Company of Los Angeles upon showing by said Title Insurance and Trust Company of Los Angeles that title is clear and delivery of title passed.

There is not included in said sale oil or oil products on hand on date of delivery of possession. All said oil and oil products are to remain the property of the Receiver, and it is distinctly understood that the office furniture and equipment in the main office at Los Angeles, California, is not included nor [80] any of the assets of the receivership estate, other than the leases and the personal property delineated in the above description.

W. L. ADKISSON.

The foregoing bid is hereby accepted by the undersigned, subject to the approval of the United States District Court, and he acknowledges receipt of ten per cent (10%) or Seventy-five Hundred Dollars ($7500.00) of said bid this 18th day of October, 1938.

B. J. BRADNER,
Receiver for Lake View Oil and Refining Company.

[Endorsed]: Filed Oct. 19, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [81]

[Title of District Court and Cause.]

ORDER SETTING TIME FOR HEARING OF PETITION FOR ORDER TO SELL THE LEASES AND THE PERSONAL PROPERTY LOCATED THEREON.

Upon filing of the verified petition of B. J. Bradner, as Receiver for Lake View Oil and Re-

fining Company, for order to sell the leases and the personal property located thereon;

Now, Therefore, It Is Hereby Ordered that hearing on Petition for Order to Sell the Leases and the Personal Property Located Thereon, in the above entitled cause, be and the same is hereby set for hearing on the 31 day of October, 1938, at the hour of 2:15, P. M., in the said Federal Court before the Honorable Wm. P. James, District Judge, Presiding in Room 582 Pacific Electric Building, Los Angeles, California, and that written notice thereof be given by mailing to the creditors and stockholders of the Lake View Oil and Refining Company.

Dated October 19, 1938.

WM. P. JAMES,

Judge of the United States District Court.

[Endorsed]: Filed Oct. 19, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [82]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF MAILING

State of California
County of Los Angeles—ss.

E. C. Perrizo, being first duly sworn, deposes and says:

That he is a citizen of the United States, over 18 years of age, a resident of Los Angeles County,

and not a party to the within action; that affiant's business address is 1123 Rowan Building, Los Angeles, California; that on October 20, 1938, affiant served copies of Notice of Hearing of Petition for Order to Sell the Leases and the Personal Property Located Thereon, by depositing in the United States Mail at Los Angeles, California, true and correct copies of said Notice, enclosed in sealed envelopes addressed to the creditors and stockholders of the Lake View Oil and Refining Company, at their respective business or residence adresses; a copy of said list of creditors and stockholders together with their business or residence addresses being hereto attached marked "Exhibit A" and made a part hereof, and copy of said Notice being hereto attached marked "Exhibit B" and made a part hereof; that postage thereon was fully prepaid; that there is either delivery service by United States mail at the place so addressed, or regular communication by mail between the place of mailing and the place so addressed.

E. C. PERRIZO.

Subscribed and sworn to before me this 21st day of October, 1938.

[Seal] B. J. BRADNER,

Notary Public in and for said County and State.

[83]

EXHIBIT "A"

List of Creditors of Lake View Oil and Refining Company.

* * * * * * *

[84]

List of Stockholders of Lake View Oil and Refining Co.

* * * * * * *

[86]

Floyd G. White, 1110 Park Central Bldg., Los Angeles, Cal.

* * * * * * *

[95]

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION FOR ORDER TO SELL THE LEASES AND THE PERSONAL PROPERTY LOCATED THEREON.

To the Creditors and Stockholders of Lake View Oil and Refining Company:

You and Each of You Will Please Take Notice:

B. J. Bradner, Receiver for Lake View Oil and Refining Company has filed herein his petition for an order to sell, assign, transfer, set over and convey to W. L. Adkisson all the right, title and interest of the Lake View Oil and Refining Company in and to the "Pentland Lease", "1st El Dora (Main) Lease", "2nd El Dora-Smith Lease", "Elk

Hill Lease" and "Midway Field Lease" located in Kern County, California, together with all machinery, equipment, derricks, apliances, etc., of every kind and character located on said leases, and subject to all the terms, conditions and provisions contained in said leases, pursuant to a written offer made to said Receiver by W. L. Adkisson dated October 18, 1938, a copy of which offer is attached to said petition; that by said offer, said W. L. Adkisson proposes to pay to said Receiver through escrow the sum of Seventy-five Thousand Dollars ($75,000.00), less 10% or $7500.00 which has been paid by him to said Receiver upon acceptance of offer by said Receiver, subject to approval of the United States District Court, when the title to the above described property is free and clear and a Lessee's policy of Title Insurance is procured showing the above leases [97] vested in the Lake View Oil and Refining Company; that there is not included in said sale oil or oil products on hand on the date of delivery of possession; all said oil and oil products are to remain the property of the Receiver and it is distinctly understood that the office furniture and equipment in the main office at Los Angeles, California, is not included nor any of the assets of the receivership estate, other than the leases and the personal property located thereon.

You and Each of You Are Hereby Further Notified That:

A hearing on the above petition will be had in the above entitled cause on Monday, the 31st day of October, 1938, at the hour of 2:15, P.M., in said Federal Court before the Honorable William P. James, District Judge Presiding, in Room 582 Pacific Electric Building, Los Angeles, California.

Dated this 19th day of October, 1938.

B. J. BRADNER,
Receiver for Lake View Oil and Refining Company.
BRADNER & WEIL,
By JEROLD E. WEIL,
Attorneys for Receiver.

[Endorsed]: Filed Oct. 22, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [98]

NOTICE OF HEARING OF PETITION FOR ORDER TO SELL THE LEASES AND THE PERSONAL PROPERTY LOCATED THEREON.

[Printer's Note]: Said Notice is not printed at this point, as it is already set forth at pages 82-84 of this printed transcript of record. [98A]

At a stated term, to wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los An-

geles on Monday the 31st day of October in the year of our Lord one thousand nine hundred and thirty-eight.

Present: The Honorable Wm. P. James, District Judge.

[Title of Cause.]

This cause coming on for hearing on petition of B. J. Bradner, Receiver, herein, filed October 19, 1938, for order to sell certain leases and the personal property thereon, to W. L. Adkisson, pursuant to order filed therewith setting hearing; B. J. Bradner, Receiver, being present, and Ralph E. Lewis, Esq., appearing for the Bank of America, National Trust and Savings Association:

At 2:25 o'clock P.M. Adolph Ramish, a creditor, makes a statement that the sale be made. Attorney Lewis states that the sale should be made. The Court makes a statement re receipt of communication from J. J. Rifkind, stating sale should be made, and said communication is filed herein.

Receiver Bradner states that he has received $7,500.00, which is 10% on account of the purchase price.

The Court signs order of sale and approves notice of sale, and the same are filed herein. [99]

[Title of District Court and Cause.]

ORDER OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY AT PUBLIC AUCTION.

This matter of sale at public auction of the oil leases and personal property located thereon of the Lake View Oil and Refining Company, a corporation, came on for hearing on the 31st day of October, 1938, at the hour of 2:15 P. M., on petition of the Receiver herein praying for the sale of the oil leases and personal property located thereon of the Lake View Oil and Refining Company, subject to all the terms, conditions and provisions therein contained; but not including in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included nor any of the assets of the receivership estate, other than the leases and the personal property located thereon; notice of said hearing for sale at public auction having been given to all creditors and stockholders and affidavit of mailing said notice being on file herein and no objections having been filed or made and all of the oil leases and personal property located thereon of the said corporation, subject to all the terms, conditions and

provisions therein contained having a fair value of the sum of $75,000.00;

Good cause appearing therefor, and it appearing to [100] the court and the court finds that the Receiver has had a certain offer submitted to him from a possible purchaser who desires to purchase the said oil leases and personal property located thereon of the said corporation, subject to all the terms, conditions and provisions therein contained, at said fair value as above set forth, and it further appearing to the court and the court finds that said Lake View Oil and Refining Company was at the time of the filing of the Bill In Equity herein and still is unable to pay its debts in due course of business; that there are not sufficient funds in said receivership estate to pay the debts of the Lake View Oil and Refining Company and that no advantage will accrue to the creditors or to the stockholders of said Lake View Oil and Refining Company by the further continuance of said receivership with respect to the said oil leases and personal property located thereon of the Lake View Oil and Refining Company, and that it is for the best interests of said Lake View Oil and Refining Company and said receivership estate and the creditors thereof and the stockholders thereof that said oil leases and personal property located thereon be sold at public auction without further appraisement and redemption to the highest bidder at the main entrance to the County Court House of Kern County,

in the City of Bakersfield, County of Kern, State of California, in accordance with the law thereunto appertaining, made and provided.

It Is, Therefore, Ordered, Adjudged and Decreed that B. J. Bradner, as Receiver, be and he is hereby authorized and directed to sell without further appraisement and without redemption to the highest bidder on the 10th day of December, 1938, at eleven o'clock in the forenoon of said day at the main entrance of the County Court House of Kern County, in the City of Bakersfield, County of Kern, State of California, in accordance with the law made and provided and thereunto appertaining the oil leases and personal property located thereon of the [101] Lake View Oil and Refining Company, for cash at a price or sum of not less than $75,000.00; 10% of the purchase price to be paid in cash by the highest bidder at the time of sale and the balance to be paid in cash upon the confirmation of the sale thereof by this court, and the delivery to the purchaser or purchasers of the oil and gas leases and the personal property located thereon. In the event that the highest bidder fails to pay the balance of the purchase price for the leases and personal property located thereon at the time of confirmation of sale, then in that event the 10% paid at the time of sale shall be retained by the Receiver as liquidated damages for failure to faithfully perform the contract of sale.

It Is Further Ordered, Adjudged and Decreed that the said B. J. Bradner, as Receiver, shall first offer the leases in single parcels including the personal property located thereon and the bids be noted, and then shall offer the leases including the personal property located thereon as a whole and the bid be noted, and shall then make a sale of the leases and the personal property located thereon to such purchaser or purchasers as in the aggregate will bring the highest price for all of the leases and personal property located thereon sold, provided, that the aggregate is not less than the total price hereinbefore fixed in this order; payment of said 10% to be then paid by the purchaser or purchasers as hereinabove provided.

It Is Further Ordered, Adjudged and Decreed that the Receiver herein insert or cause to be inserted a publication of Notice of Sale as provided by law at least once a week for a period of four successive weeks prior to said sale in "The Daily Report", a newspaper printed and regularly issued and having a general circulation in the county of Kern, State of California.

It Is Further Ordered, Adjudged and Decreed that B. J. Bradner, Receiver herein hold and conduct said sale. [102]

It Is Further Ordered, Adjudged and Decreed that the Receiver report his proceedings in the premises to this Court for confirmation and further orders.

The oil leases and personal property of the Lake View Oil and Refining Company are located in the County of Kern, State of California and described as follows, to-wit:

(1) Pentland Lease

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, a widow, as lessor, and Lake View Oil and Refining Company, a corporation, as lessee, covering the premises described as follows, to-wit:

> The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west, S. B. B. & M., Kern County, California, containing one hundred sixty (160) acres, more or less;

which includes producing wells located thereon; that the Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery, derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells; that upon transfer of title assignment of said lease is subject to the consent of the Title Insurance and Trust Company of Los Angeles; that there is located on said lease as a part of the personal property an electric dehydrating unit

C-241, licensed by the Petroleum Rectifying Company, which has been operated by the receivership under a non-assignable License Agreement dated October 1, 1927, and said unit will be sold only on condition that the buyer enter into a License Agreement with the Petroleum Rectifying Company covering said unit. [103]

(2) 1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a corporation, lessee, same being Los Angeles Serial No. 033378, covering land described as follows:

> The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern county, California;

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that there is personal property located on said lease consist-

ing of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

(3) 2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

> Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern county, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora [104] Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to securing a new bond covering

said lease. No personal property is located on said lease.

(4) Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Visalia 09704, and also known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee, which company's name was changed to Lake View Oil and Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

> W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern county, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of annual rental effective June 1, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

(5) Midway Field Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf

by the Secretary of the Interior, same being Serial Los Angeles 033396a, and [105] Midway Field Oil Company, a corporation, as lessee, covering the following described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter (SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921, that there is personal property located thereon consisting of derricks, rigs, casing, machinery, equipment, tools and appliances; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

Said leases are subject to all the terms, conditions and provisions therein contained.

Dated Oct. 31, 1938, at Los Angeles, California.

WM. P. JAMES,

Judge of the U. S. District Court.

[Endorsed]: Filed Oct. 31, 1938, R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk. [106]

[Title of District Court and Cause.]

NOTICE OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY AT PUBLIC AUCTION.

Notice Is Hereby Given, that the undersigned, as Receiver in Equity of the oil leases and personal property located thereon of Lake View Oil and Refining Company, a corporation, within the Southern District of California, and pursuant to an order of the United States District Court, Southern District of California, Central Division, made on the 31st day of October, 1938, in the above entitled cause, will offer for sale, at public auction, to be held at the main entrance of the County Court House of Kern County, in the City of Bakersfield, County of Kern, State of California, on the 10th day of December, 1938, at the hour of 11:00 o'clock A. M., of said date, all those certain oil leases and personal property located thereon, being the property of the Lake View Oil and Refining Company,

lying and situate in the County of Kern, State of California, and more particularly described as follows, to-wit:

(1) Pentland Lease

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, a widow, as lessor, and Lake View Oil and Refining Company, a corporation, as lessee, covering the premises described as follows, to-wit:

> The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west, S. B. B. & M., Kern county, California, containing one hundred sixty (160) acres, more or less; [107]

which includes producing wells located thereon; that the Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells; that upon transfer of title, assignment of said lease is subject to the consent of the Title Insurance and Trust Company of Los Angeles; that there is located on said lease as a part of the personal property an electric dehydrating unit C-241, licensed by the Petroleum Rectifying Company, which has been

operated by the receivership under a non-assignable License Agreement dated October 1, 1927, and said unit will be sold only on condition that the buyer enter into a License Agreement with the Petroleum Rectifying Company covering said unit.

(2) 1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a corporation, lessee, same being Los Angeles Serial No. 033378, covering land described as follows:

> The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern county, California;

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, [108] by the Department of the Interior; that there is personal property located on said lease consisting of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that upon transfer of title said lease is subject to the

approval of the Department of the Interior, and subject to a new bond covering said lease.

(3) 2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

> Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern county, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to securing a new bond covering said lease. No personal property is located on said lease.

(4) Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the

Interior, same being Serial Visalia 09704, and also known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee which company's name was changed to Lake View Oil [109] and Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

> W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern county, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of annual rental effective June 1, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

(5) Midway Field Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Los Angeles 033396a, and Midway Field Oil Company, a corporation, as lessee, covering the following described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter

(SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921, that there is personal property located thereon consisting of derricks, rigs, casings, machinery, [110] equipment, tools and appliances; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

Said leases are subject to all the terms, conditions and provisions therein contained.

That there is not included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products are to remain the property of the Receiver, and this sale is made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon.

Notice Is Hereby Given that an offer has been received from W. L. Adkisson to purchase the aforementioned oil leases and personal property located thereon at and for the price of Seventy-five Thousand Dollars ($75,000.00) cash, lawful money of the United States of America, 10% of the purchase price having been paid in cash by the said W. L. Adkisson at the time said offer was made and the balance to be paid in cash upon the confirmation of the sale thereof by this court and the delivery to the purchaser of a report of Title Insurance, showing such property vested in the purchaser, subject to all the terms, conditions and provisions contained in said leases;

That in the event no bid for cash in a greater sum be made at the sale of this property, the undersigned proposes to accept the aforementioned offer and consummate such sale if such bid is made at this sale;

That the said sale, however, will be made to the highest and best bidder for cash and for a purchase price of not less than Seventy-five Thousand Dollars ($75,000.00); 10% of the purchase price to be paid in cash by the highest bidder at the time of [111] sale and the balance to be paid upon confirmation of the sale thereof by this court and the delivery to the purchaser or purchasers of a report of Title Insurance, showing such property vested in the purchaser or purchasers, subject to all the terms, conditions and provisions contained in said leases and the personal property located thereon. In the event

that the highest bidder fails to pay the balance of the purchase price for the leases and personal property located thereon at the time of confirmation of sale, then in that event the 10% paid at the time of the sale shall be retained by the Receiver as liquidated damages for failure to faithfully perform the contract of sale; that the said B. J. Bradner, as Receiver, will first offer the leases in single parcels including the personal property located thereon and the bids will be noted, and then will offer the leases including the personal property located thereon as a whole and the bid will be noted, and will then make a sale of the leases and the personal property located thereon to such purchaser or purchasers as in the aggregate will bring the highest price for all of the leases and personal property thereon sold, provided, that the aggregate is not less than the total price hereinbefore set forth in this notice and fixed by the Order of Sale; payment of said 10% to be then paid by the purchaser or purchasers as hereinabove provided.

Any sale of said property shall be subject to the approval and confirmation of the United States District Court for the Southern District of California, Central Division.

Dated this 31st day of October, 1938.

B. J. BRADNER
Receiver for Lake View Oil and Refining Company

BRADNER & WEIL
By B. J. BRADNER
Attorneys for Receiver

Form of Notice approved by

WM. P. JAMES

Judge of the U. S. District Court

[Endorsed]: Filed Oct. 31, 1938. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk. [112]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAILING.

State of California,
County of Los Angeles—ss.

E. C. Perrizo, being first duly sworn, deposes and says:

That he is a citizen of the United States, over 18 years of age, a resident of Los Angeles County, and not a party to the within action; that affiant's business address is 1123 Rowan Building, Los Angeles, California; that on November 4. 1938, affiant served copies of the Notice of Sale of Oil Leases and Personal Property Located Thereon of Lake View Oil and Refining Company at Public Auction, by depositing in the United States Mail at Los Angeles, California, true and correct copies of said Notice, enclosed in sealed envelopes addressed to the creditors and stockholders of the Lake View Oil and Refining Company, at their respective business or residence addresses; a copy of said list of creditors and stockholders together with their business or residence addresses being hereto attached marked

"Exhibit A", and made a part hereof, and copy of said Notice being hereto attached marked "Exhibit B" and made a part hereof; that postage thereon was fully prepaid; that there is either delivery service by United States mail at the place so addressed, or regular communication by mail between the place of mailing and the place so addressed.

E. C. PERRIZO

Subscribed and sworn to before me this 8th day of November, 1938.

[Seal] B. J. BRADNER

Notary Public in and for said County and State

[113]

EXHIBIT "A"

List of Creditors of Lake View Oil and Refining Company.

* * * * * * *

[114]

List of Stockholders of Lake View Oil and Refining Company.

* * * * * * *

Floyd G. White, 1110 Park Central Bldg., Los Angeles, Cal.

[116]

EXHIBIT "B"

NOTICE OF SALE

(See Notice of Sale, Pages 95-96 attached hereto.)

[Endorsed]: Filed Nov. 9, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [117]

[Title of District Court and Cause.]

PETITION OF RECEIVER FOR CONFIRMATION OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY.

To the Honorable Wm. P. James, Judge of the Above Entitled Court:

Comes now B. J. Bradner, Receiver of Lake View Oil and Refining Company, a corporation, and respectfully petitions your Honorable Court as follows:

That heretofore, to-wit, on the 19th day of October, 1938, your petitioner as such Receiver presented to your Honorable Court a petition wherein among other things he petitioned that this court make its order authorizing him as such Receiver to sell at public auction all the oil leases and personal property located thereon of Lake View Oil and Refining Company, a corporation, subject to all the terms, conditions and provisions contained in said

leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon); said property lying and being in the County of Kern, State of California, and particularly [131] described in "Exhibit A" hereto attached and made a part hereof as fully as if set out herein; that in said petition, your petitioner advised this Honorable Court that he had received a written offer from W. L. Adkisson to purchase said oil leases and personal property located thereon, subject to all the terms, conditions and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon), for the sum of $75,000.00 cash, 10% or $7,500.00 of said bid to be paid upon acceptance thereof by the Receiver for the Lake View Oil and Refining Company and the

balance to be paid upon confirmation of sale by the United States District Court for the Southern District of California, and the delivery to said W. L. Adkisson of a report of Title Insurance showing such property vested in him, subject to all the terms, conditions and provisions contained in said leases.

That thereafter to-wit, on the 31st day of October, 1938, your Honorable Court, pursuant to said petition did make its order authorizing, directing and ordering your petitioner as such Receiver to sell to the highest bidder the oil leases and personal property located thereon more particularly described in "Exhibit A" hereto attached and made a part hereof, subject to all the terms, conditions and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the [132] assets of the receivership estate, other than the leases and the personal property located thereon), at public auction to be held at the main entrance of the County Court House of Kern County, in the City of Bakersfield, State of California, on December 10, 1938, at eleven o'clock A. M., at and for a purchase price of not less than the sum of $75,000.00 in cash, lawful money of the United States; that your Honorable Court did further make its

own order directing your petitioner as such Receiver to cause a publication of Notice of said public auction to be made as provided by law at least once a week for a period of four (4) successive weeks prior to the date of said public auction, in a newspaper printed and regularly issued and having a general circulation in the County of Kern, State of California.

That your petitioner as such Receiver and pursuant to the terms of said order did cause a publication of the notice of said public auction and sale to be published once a week for four (4) successive weeks and to-wit: On November 2, 9, 16, 23 and 30, 1938, in "The Daily Report" a newspaper printed and regularly issued and having a general circulation in the County of Kern, State of California, did otherwise in all respects comply with said order of sale (said notice of sale at public auction having been given to all creditors and stockholders of the Lake View Oil and Refining Company and affidavit of service by mailing said notice being on file herein) and did on the 10th day of December, 1938, at the hour of eleven o'clock A. M., of said day offer for sale first by parcels and then as a whole the above described oil leases and personal property located thereon, subject to all the terms, conditions and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to

be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of [133] the assets of the receivership estate, other than the leases and the personal property located thereon), at public auction held at the main entrance of the County Court House of Kern County, in the City of Bakersfield, State of California.

That at said public auction and sale, came the following:

Loren L. Hillman, President of and for and on behalf of Hillman-Long, Inc., who bid the sum of $37,000.00 in cash for the "Elk Hill Lease" which is more fully described in said "Exhibit A" hereto attached and made a part hereof.

A. D. Mitchell who bid the sum of $48,500.00 in cash for the "Pentland Lease" which is more fully described in said "Exhibit A" hereto attached and made a part hereof.

A. D. Mitchell who bid the sum of $3750.00 in cash for the "1st El Dora (Main) Lease" which is more fully described in said "Exhibit A" hereto attached and made a part hereof.

A. D. Mitchell who bid the sum of $3100.00 in cash for the "2nd El Dora-Smith Lease" which is more fully described in said "Exhibit A" hereto attached and made a part hereof.

W. I. Cunningham, Geologist of and for and on behalf of Bishop Oil Company who bid the sum of $8200.00 in cash for the "Midway Field Lease"

which is more fully described in said "Exhibit A" hereto attached and made a part hereof.

That said bids so made by said purchasers were the highest and best bids made for said oil leases and personal property located thereon, and the aggregate thereof to-wit: $100,550.00 being more than the total price fixed by the Order of Sale in the above entitled matter and that said purchasers are responsible and able to comply with the terms of said bid, and no further bids being made, I thereupon declared said bids accepted and there publicly sold and struck off said oil leases and personal property particularly described in "Exhibit A" hereto attached and made a part hereof, to said purchasers, at their [134] respective bids therefor and declared the same sold to them, subject to confirmation by this court and subject to a higher bid in open court at the time of confirmation of sale by this court.

That at least 10% of the purchase price has been paid in cash by each of the said purchasers at the time of sale and the balance to be paid upon confirmation of the sale thereon by this court and the delivery to the purchasers of a report of Title Insurance, showing such leases vested in the respective purchasers, subject to all the terms, conditions and provisions contained in said leases.

That your petitioner has heretofore and on the 14th day of December, 1938, filed herein his report and return of sale of said oil leases and personal property located thereon, subject to all the terms, conditions and provisions contained in said leases

(there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon).

Wherefore, your petitioner prays that Your Honorable Court make its order for a hearing upon this petition upon such notices and terms as Your Honorable Court may deem proper and that upon hearing thereof in open court, in the absence of a higher bid or bids on any one or all of said oil leases and personal property located thereon, an order be made and entered herein approving and confirming the sale by your petitioner, or if there be a higher bid or bids satisfactory to the court, then confirming sale to such higher bidder or bidders, of the above described oil leases and personal property located thereon, subject to all [135] the terms, conditions and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and

the personal property located thereon), and instructing, authorizing and directing your petitioner as such Receiver to execute to each of the purchasers upon the payment of the balance of the purchase price bid by them for said oil leases and personal property located thereon, any and all conveyance or conveyances necessary and proper in the premises and to deliver to the purchasers a report of Title Insurance showing such leases vested in the respective purchasers, and giving and granting to the Board of Directors of the Lake View Oil and Refining Company, a corporation, full power and authority to act as directors and as such directors to authorize the execution on behalf of the corporation of all necessary conveyances in order to pass title to the respective purchasers, and for such other and further orders as to this court may seem just and proper.

B. J. BRADNER

Petitioner, Receiver for Lake View Oil and Refining Company

BRADNER & WEIL

By JEROLD E. WEIL

Attorneys for Receiver [136]

State of California,
County of Los Angeles—ss.

B. J. Bradner, being by me first duly sworn, deposes and says:

That he is the Receiver in the above entitled action and the petitioner herein; that he has read

the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

B. J. BRADNER

Subscribed and sworn to before me this 14th day of December, 1938.

[Seal] MARY IVES ANDERSON

Notary Public in and for said County and State

[Endorsed]: Filed Dec. 14, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk.

EXHIBIT "A"

All those certain oil leases and personal property located thereon, being the property of the Lake View Oil and Refining Company, lying and situate in the County of Kern, State of California, and more particularly described as follows, to-wit:

(1) Pentland Lease

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, a widow, as lessor, and Lake View Oil and Refining Company, a corporation, as lessee, covering the premises described as follows, to-wit:

The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west, S. B. B.

& M., Kern county, California, containing one hundred sixty (160) acres, more or less;

which includes producing wells located thereon; that the Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery, derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells; that upon transfer of title, assignment of said lease is subject to the consent of the Title Insurance and Trust Company of Los Angeles; that there is located on said lease as a part of the personal property an electric dehydrating unit C-241, licensed by the Petroleum Rectifying Company, which has been operated by the receivership under a non-assignable License Agreement dated October 1, 1927, and said unit will be sold only on condition that the buyer enter into a License Agreement with the Petroleum Rectifying Company covering said unit.

(2) 1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as [125] lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a corporation, lessee, same being Los Angeles Serial No. 033378, covering land described as follows:

The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern County, California;

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that there is personal property located on said lease consisting of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

(3) 2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern County, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil [126] Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to securing a new bond covering said lease. No personal property is located on said lease.

(4) Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Visalia 09704, and also known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee which company's name was changed to Lake View Oil Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern county, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of

annual rental effective June 1, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

(5) Midway Field Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Los Angeles 033396a, and Midway Field Oil [127] Company, a corporation, as lessee, covering the following described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter (SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921, that there is personal property located thereon consisting of derricks, rigs, casing, machinery, equipment,

tools and appliances; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

Said leases are subject to all the terms, conditions and provisions therein contained.

That there is not included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products are to remain the property of the Receiver, and this sale is made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon. [128]

[Title of District Court and Cause.]

ORDER FOR HEARING ON PETITION OF RECEIVER FOR CONFIRMATION OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY.

B. J. Bradner, Receiver for Lake View Oil and Refining Company, a corporation, having filed herein his petition for an order confirming the sale of certain oil leases and personal property located thereon of Lake View Oil and Refining Company, a corporation, subject to all the terms, conditions

and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale to be made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon), heretofore sold at public auction by said Receiver under order of this court dated October 31, 1938, said petition setting forth among other things that as such Receiver, he did, on December 10, 1938, sell at public auction all of the said oil leases and personal property located thereon of Lake View Oil and Refining Company, a corporation, subject to all the terms, conditions and provisions contained in said leases (there not being included in said sale oil or oil products on hand on date of delivery [138] of possession, and all said oil and oil products to remain the property of the Receiver, and the said sale being made with the understanding that the office furniture and equipment in the main office at Los Angeles, California, is not included therein, nor are any of the assets of the receivership estate, other than the leases and the personal property located thereon), in Kern County, California, to the following purchasers;

Loren L. Hillman, President of and for and on behalf of Hillman-Long, Inc., who bid the sum of $37,000.00 in cash for the following:

Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Visalia 09704, and also known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee which company's name was changed to Lake View Oil and Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

> W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern county, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of annual rental effective June 1, 1934; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

A. D. Mitchell who bid the sum of $48,500.00 in cash for the following:

Pentland Lease

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, [139] a widow, as lessor, and Lake View Oil and Refining Company, a cor-

poration, as lessee, covering the premises described as follows, to-wit:

> The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west, S. B. B. & M., Kern county, California, containing one hundred sixty (160) acres, more or less;

which includes producing wells located thereon; that the Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery, derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells; that upon transfer of title, assignment of said lease is subject to the consent of the Title Insurance and Trust Company of Los Angeles; that there is located on said lease as a part of the personal property an electric dehydrating unit C-241, licensed by the Petroleum Rectifying Company, which has been operated by the receivership under a non-assignable License Agreement dated October 1, 1927, and said unit will be sold only on condition that the buyer enter into a License Agreement with the Petroleum Rectifying Company covering said unit.

A. D. Mitchell who bid the sum of $3750.00 in cash for the following:

1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a corporation, lessee, same being Los Angeles Serial No. 033378, covering land described as follows: [140]

> The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern County, California:

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by P. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that there is personal property located on said lease consisting of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

A. D. Mitchell who bid the sum of $3100.00 in cash for the following:

2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

> Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern County, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by P. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; **[141]** that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to securing a new bond covering said lease. No personal property is located on said lease.

W. I. Cunningham, Geologist of and for and on behalf of Bishop Oil Company who bid the sum of $8200.00 in cash for the following:

Midway Field Lease

That certain oil and gas lease dated the 23rd day

of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Los Angeles 033396a, and Midway Field Oil Company, a corporation, as lessee, covering the following described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter (SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921, that there is personal property located thereon consisting of derricks, rigs, casing, machinery, equipment, tools and appliances; that upon transfer of title said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

That at least 10% of the purchase price has been paid in cash by each of the said purchasers at the time of sale and the balance to be paid upon con-

firmation of the sale thereon by [142] this court and the delivery to the purchasers of a report of Title Insurance, showing such leases vested in the respective purchasers, subject to all the terms, conditions and provisions contained in said leases.

That reference is made to said petition and report and return of said sale filed by the receiver herein on December 14, 1938.

It Is Ordered that a hearing upon said petition for confirmation be had on the 27th day of December, 1938, at the hour of ten o'clock A. M., on said day in said court before the Honorable Wm. P. James, District Judge presiding in Room 582 Pacific Electric Building, Los Angeles, California, and at said time and place a higher bid or bids may be accepted on any one or all of said oil leases and personal property located thereon.

It Is Further Ordered that Notice of such hearing of said petition for confirmation be given by the Receiver herein by mailing a copy of this Order to all the known creditors and stockholders of the Lake View Oil and Refining Company, a corporation, at least ten (10) days prior to the date of said hearing and by publication of a copy of this order for three (3) successive days prior to the date of said hearing in the Los Angeles Daily Journal of Los Angeles, California, and in The Daily Report of Bakersfield, California, and that a copy of said petition, together with a copy of this Order be served upon the parties herein and upon the respec-

tive purchasers either by personal delivery or by registered mail, postage prepaid, not less than ten (10) days before the hearing on said petition.

Dated December 14, 1938, at Los Angeles, California.

WM. P. JAMES

District Judge

[Endorsed]: Filed Dec. 14, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [143]

[Title of District Court and Cause.]

PROTEST OF F. G. WHITE ON HEARING OF PETITION OF RECEIVER FOR CONFIRMATION OF SALE.

Now comes F. G. White and protests the confirmation of the sale of the assets, including various leases and personal property of the Lakeview Oil and Refining Company, and by way of protest alleges:

1. That he is one of the Directors of the Lakeview Oil and Refining Company, and that he is also a stockholder and represents various stockholders owning large blocks of the stock of said corporation.

2. That if the sale of the assets for the consideration heretofore agreed upon is confirmed, the Receiver will not receive sufficient to pay off the creditors of the corporation in full, and there will be nothing whatsoever remaining for the stockholders of said corporation. [165]

3. That at the inception of the Receivership herein, the properties which the Receiver now proposes to sell for a total sum of approximately $100,550.00 were appraised at $1,024,965.44, and the total indebtedness of said corporation was approximately $289,549.91; that said indebtedness has now been reduced to $231,266.76 during said Receivership.

4. Your petitioner is informed and believes, and therefore alleges, that the Receiver now has on hand sums in excess of $54,000.00. Your petitioner further alleges that the properties which the Receiver proposes to sell were appraised within a year last past for a sum in excess of $158,000.00; that because of new and deeper oil sands which have been discovered, all of said properties have materially increased in value since said appraisement.

5. Your petitioner further alleges that the proposed sale of each of said leases and assets of the said corporation is for a grossly inadequate consideration.

6. That if an appraisement were made at the present time, your petitioner believes and therefore alleges that all of said properties would show a material increase in value, and that the value of a new appraisement would show sufficient assets to pay all creditors in full and still leave a substantial equity for the stockholders of said corporation.

7. That if the Receivership were continued and allowed to carry on at its present rate, the creditors

would all be paid off in full and the entire properties saved to the stockholders; that your petitioner is informed and believes that the auditor's report herein will show that there has been an operating profit since the Receivership and during the last eight years in excess of $170,000.00.

Wherefore, your petitioner prays: [166]

1. That the confirmation of sale of said assets be denied; or,

2. In lieu thereof this court continue the hearing on the confirmation of said sale for a period of thirty days, and that during the interim this Honorable Court appoint three disinterested parties to make a current appraisement of said properties, and that at least one of said appraisers be a recognized consulting petroleum engineer to be nominated by your petitioner, and that said appraisers be instructed to have said appraisement on file herein at least ten days prior to said further hearing on confirmation of sale herein.

THORNTON WILSON
Attorney for Petitioner

State of California,
County of Alameda.—ss.

F. G. White, being first duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on

information and belief, and as to those matters, he believes it to be true.

F. G. WHITE

Subscribed and sworn to before me this 23rd day of December, 1938.

IDA PRATT

Notary Public in and for the County of Alameda, State of California

[Seal]

[Endorsed]: Filed Dec. 27, 1938. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. [167]

At a stated term, to wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 27th day of December in the year of our Lord one thousand nine hundred and thirty-eight.

Present: The Honorable Wm. P. James, District Judge.

Nora L. Powers, et al., Plaintiffs, vs. Lake View Oil and Refining Co., Defendant.—No. T-121-J Equity.

This cause coming on for hearing on Receiver's Report and Return of Sale of certain Oil Leases

and Personal Property located thereon, of Lake View Oil and Refining Co., and Petition of B. J. Bradner, Receiver for confirmation of sale of Oil Leases and Personal Property located thereon, filed Dec. 14, 1938, pursuant to order filed therewith, setting this day for hearing. The bids received for the property, subject to the confirmation by the Court and subject to a higher bid in open Court at the time of the confirmation of sale by this Court are as follows:

	Cash Bids Received
(1) Pentland Lease:	
A. D. Mitchell	$48,500.
(2) 1st El Dora (Main) Lease:	
A. D. Mitchell	$ 3,750.
(3) 2nd El Dora-Smith Lease:	
A. D. Mitchell	$ 3,100.
(4) Elk Hills Lease:	
Loren L. Hillman, President of and for and on behalf of Hillman-Long, Inc.	$37,000.
(5) Midway Field Lease:	
W. I. Cunningham, Geologist of and for and on behalf of Bishop Oil Company	$ 8,200.

The law firm of Bradner & Weil, by J. E. Weil, Esq., appearing for the Receiver herein, B. J. Bradner, who is present; J. J. Rifkind, Esq., appearing for Oil Well Supply Co., a creditor; Raphael Dech-

ter, Esq., appearing for A. D. Mitchell; Thornton Wilson, Esq., appearing for certain stockholders and directors of defendant corporation; A. H. Bargion being present as official court reporter; [168]

B. J. Bradner, Esq., Receiver, states that he has just been served with written protest to the sale; and Thornton Wilson, Esq., reads written protest of F. G. White to confirmation of sale, and makes a statement of objections to the sale and makes offer of proof of certain facts as to the value of the Elk Hills and Pentland Leases; Attorney Rifkind makes a statement on behalf of the Oil Well Supply Co.; Attorney Dechter makes a statement; Thornton Wilson, Esq., makes offer of proof in support of the protest to the sale; Attorney Rifkind makes a statement of objections to the said offer of proof; and the Court orders that the offer of proof which the counsel expresses in the record, is refused by the Court, and an exception noted; and the objections of the other counsel to the offer are ordered sustained.

B. J. Bradner, Esq., Receiver herein, now offers the following separately for sale to a higher bidder than the offers received and reported to the Court by the Receiver:

(1) above. No further bids received, and it is ordered that the sale be confirmed unless a higher aggregate bid is received.

(2) Bids are made separately by Gordon Holmes and A. D. Mitchell, and the highest bid having been made by A. D. Mitchell in the

sum of $7500. the Court orders the sale confirmed unless there is a higher aggregate bid hereafter made.

(3) No further bids are received, and it is ordered that the bid in the sum as reported be confirmed, unless a higher aggregate bid is hereafter made.

(4) No further bids are received, and it is ordered that the bid in the sum as reported be confirmed, unless a higher aggregate bid is hereafter made.

(5) Bids are made separately by Gordon Holmes and A. D. Mitchell, and the highest bid having been made by A. D. Mitchell in the sum of $9,100.00, the Court orders the sale confirmed, unless there is a higher aggregate bid hereafter made.

The Receiver now reports to the Court that the aggregate amount of the bids received is the sum of $105,200.00; and pursuant to the direction of the Court, the Receiver now offers all said leases (1) to (5), inclusive, for sale to any higher bidder than the amount of $105,200.00, and there being no response, the Court orders the sale confirmed. Counsel for the Receiver to prepare and present form of written orders thereon. [169]

[Title of District Court and Cause.]

ORDER FIXING TIME FOR FILING OBJECTIONS

To F. G. White and to His Counsel Thornton Wilson, Esq.:

The order confirming sale of assets of Lake View Oil and Refining Company having been filed herein, and a copy of said order having been served upon said Thornton Wilson, Esq.;

It Is Hereby Ordered that said F. G. White and his counsel Thornton Wilson, Esq. be and they are hereby given five (5) days from the date of this order in which to file objections or amendments thereto.

Done this 13 day of January, 1939.

WM. P. JAMES,
Judge of the United States District Court.

[Endorsed]: Filed Jan. 13, 1939
R. S. ZIMMERMAN, Clerk
By L. B. FIGG, Deputy Clerk. [170]

AFFIDAVIT OF SERVICE BY MAIL
(C. C. P. 1013a)

(Must be attached to original or a true copy of paper served)

No. In Equity T-121-J

State of California,
County of Los Angeles—ss.

Ann G. Smith, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 1120 Rowan Building, Los Angeles, California. That affiant served a certified copy of the attached copy of original Order Fixing Time for Filing Objections by placing said copy in an envelope addressed to Thornton Wilson, Esq., at his office address, which is Central Bank Building, Oakland, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on January 13, 1939, deposited in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

ANN. G. SMITH

Subscribed and sworn to before me January 13, 1939.

B. J. BRADNER,
Notary Public in and for the County of Los Angeles, State of California.

[Seal] [171]

[Title of District Court and Cause.]

ORDER OF CONFIRMATION OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY

This matter of confirmation of sale came on regularly for hearing on the 27th day of December, 1938, at the hour of ten o'clock A. M., and it appearing that on the 19th day of October, 1938, B. J. Bradner as Receiver herein filed a petition for order to sell the leases and personal property located on each of the demised premises for the sum of $75,000.00, and hearing on said petition having been regularly set by the court for October 31, 1938, at the hour of 2:15 P. M., and written notice of said last mentioned hearing having been given by the Receiver to all the creditors and stockholders of Lake View Oil and Refining Company, and no one appearing to object to said petition, the court did on said 31st day of October, 1938, make and enter its order authorizing and directing the Receiver to sell the said leases and personal property (hereinafter described) to the highest bidder on the 10th day of December, 1938, at eleven o'clock A. M., of said day at the main entrance of the County Court House of Kern County, in the City of Bakersfield, County of Kern, State of California, for cash at a price of not less than $75,000.00, and directing the manner of such sale and the percentage of the purchase price to be paid by

the bidder or bidders and the notice to be given of said sale; and it appearing that thereafter the said Receiver caused notice to be given of said sale in the manner directed [172] by said last mentioned order, and it appearing in that connection that said Receiver caused a publication of the notice of said sale to be published once a week for four successive weeks and to-wit: On November 2, 9, 16, 23 and 30, 1938, in The Daily Report a newspaper printed and regularly issued and having a general circulation in the County of Kern, State of California, and did cause written notice of said sale to be given to all creditors and stockholders of Lake View Oil and Refining Company and did on the 10th day of December, 1938, at the hour of eleven o'clock A. M., of said day offer for sale first by parcels and then as a whole the said oil leases and personal property located thereon (hereinafter described) and said Receiver having thereafter and on the 14th day of December, 1938, filed herein his return of said sale and his petition for confirmation of said sale from which it appears that said Receiver did at said sale sell, subject to the confirmation by the court and to higher bids in open court at the time of confirmation, and in accordance with the prior order of the court, said leases and personal property located thereon in accordance with the highest and best bids made therefor, to-wit:

To Hillman-Long, Inc., a corporation, which through and by Loren L. Hillman, its President,

bid the sum of $37,000.00 in cash for the "Elk Hill Lease" (hereinafter described);

To A. D. Mitchell who bid the sum of $48,500.00 in cash for the "Pentland Lease" (hereinafter described);

To A. D. Mitchell who bid the sum of $3750.00 in cash for the "1st El Dora (Main) Lease" (hereinafter described);

To A. D. Mitchell who bid the sum of $3100.00 in cash for the "2nd El Dora-Smith Lease" (hereinafter described);

To Bishop Oil Company, which through and by W. I. Cunningham, its Geologist, bid the sum of $8200 in cash for the "Midway Field Lease" (hereinafter described); [173]

and the court having set said last mentioned petition for hearing on the 27th day of December, 1938, at the hour of ten o'clock A. M., of said day and by order required notice to be given of the hearing on said last mentioned petition, and it appearing that said Receiver did give notice of said last mentioned hearing by mailing notice of the order setting said petition for hearing to all the known creditors and stockholders of Lake View Oil and Refining Company, a corporation, at least ten (10) days prior to the date of said hearing and by publication of a copy of said last mentioned order for three successive days prior to the date of said hearing in the Los Angeles Daily Journal, Los Angeles, California, and for three successive

days prior to the date of said hearing in The Daily Report of Bakersfield, California, and did cause a copy of said last mentioned petition, together with a copy of said last mentioned order to be served upon the parties herein and upon the respective purchasers by registered mail, postage prepaid, not less than ten (10) days before the hearing on said last mentioned petition, and did in all respects (whether expressly set forth or enumerated herein or not) comply with the aforementioned orders of this court; and this matter having come on for hearing as heretofore stated on the 27th day of December, 1938, at ten o'clock A. M. of said day and certain creditors appearing by counsel Joseph J. Rifkind, Esq., and urging the confirmation of sale of said leases and the personal property located thereon at the prices theretofore bid therefor or at such higher price or prices as might be bid in open court and none of the creditors appearing to object to the confirmation of said sale, and one F. G. White appearing by counsel Thornton Wilson, Esq., as a director and stockholder of Lake View Oil and Refining Company and on said 27th day of December, 1938, and not before, having filed his protest to the confirmation of said sale and in open court withdrawing protest as to sale of the Elk Hill lease, and having offered to prove certain facts to which offer objection was made and by the court sustained, and the court [174] then having announced in open court that higher bids might be

made for any or all of said properties by any person or persons desiring to make such bid or bids, and having directed said Receiver in open court to offer said properties for higher bids and as a result thereof higher bids were made for the 1st El Dora (Main) Lease" (hereinafter described) A. D. Mitchell finally making the highest bid therefor, to-wit: $7,500.00 and higher bids were made for the "Midway Field Lease" (hereinafter described) and as a result thereof, A. D. Mitchell finally made the highest bid therefor, to-wit: $9,100.00 and no higher bids having been made separately for the "Pentland," and "2nd El Dora-Smith" and "Elk Hill" Leases hereinafter more particularly described and all of said properties then having been offered for a higher bid or bids, and no one offering to bid more than the sum of $105,200.00 for the whole of said properties, being the aggregate sum of the highest bids for each of said properties when offered by parcels, and good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that the sale of each of the leases and the personal property located thereon (hereinafter more particularly described) be and the same is hereby confirmed to the respective purchasers hereinafter set forth and at the prices hereinafter set forth, and subject to all the terms and conditions of this order; the sale of each lease and the personal property located thereon being separately confirmed to said respective purchaser independently of the sale

of any other lease and the personal property thereon and all of said sales being confirmed as a whole.

It Is Further Ordered, Adjudged and Decreed that said Receiver is hereby instructed, authorized and directed to execute to each of the purchasers any and all conveyance or conveyances necessary and proper in the premises and by such instrument or [175] instruments of conveyance, said Receiver shall convey and transfer, to each of the purchasers the property sold to the respective purchaser and all the right, title and interest of said Receiver, as such, and all the right, title and interest of said Lake View Oil and Refining Company, a corporation, of, in and to the respective leases and personal property located thereon, assigned, transferred and conveyed.

That the said Receiver is hereby authorized and directed to deliver said instrument or instruments of conveyance into escrow with the Title Insurance and Trust Company of Los Angeles, hereby designated as escrow officer for such purpose, for delivery to each of said purchasers, respectively, when said escrow officer holds for the account of said Receiver, the balance of the purchase price due from such purchaser. That concurrently with or within five (5) days after receiving notice of delivery into escrow by said Receiver of the conveyance or conveyances herein required to be delivered by him respecting any one of said leases and the personal property located thereon, the purchaser

of said lease and said personal property shall pay into said escrow the unpaid balance of the purchase price in cash, for the benefit of the receivership estate and to be paid to said B. J. Bradner, as such Receiver, as to each lease, respectively, when the Title Insurance and Trust Company of Los Angeles, California, is able to deliver to the purchaser of the respective lease, any and all conveyance or conveyances necessary and proper in the premises and a title report or certificate or other evidence of title (unless such report or certificate or other evidence of title as to any particular lease shall be waived in writing by the purchaser of that lease, in which event the delivery of such title report or certificate or other evidence of title shall not be a condition precedent to the payment to said Receiver of the balance of the purchase price of such lease) [176] showing the title to said oil lease and personal property located thereon, as hereinafter more particularly described, vested in the respective purchaser, free and clear of liens and encumbrances, except such as are approved by the respective purchasers, but subject to all the terms, conditions and provisions contained in such lease.

That when the said Title Insurance and Trust Company is able to deliver any and all conveyance or conveyances necessary and proper to be delivered respecting any one of said leases and the personal property located thereon, together with the

title report or certificate or other evidence of title (unless waived) hereinbefore provided for, it may cause to be recorded such conveyance or conveyances, respecting such lease and the personal property, executed and delivered into said escrow by said B. J. Bradner, Receiver, as aforesaid, in the office of the County Recorder of Kern County, California, and shall pay over unto the said B. J. Bradner, Receiver for Lake View Oil and Refining Company, the unpaid balance of the purchase price so paid into escrow by the purchaser of said lease and personal property, after deducting from said sum necessary escrow fees and charges and expenses necessarily incurred and paid by said Title Insurance and Trust Company in the closing of said escrow as to such particular lease.

That upon the closing of said escrow as to any particular lease and the personal property located thereon and the delivery of the conveyance or conveyances, assignment or assignments relating to said lease and personal property to the respective purchaser, such purchaser shall be let into possession of the particular oil lease and personal property purchased by him or it and hereinafter more particularly described and the Receiver herein shall forthwith deliver said oil lease and personal property to such purchaser, and thereafter the respective purchaser shall [177] hold possession of said oil lease and the personal property so transferred to him or it and every part thereof free from all

claims, rights, interest or equities of, in or to the same or any part thereof by Lake View Oil and Refining Company, a corporation, or any creditor or stockholder of said corporation or any person claiming by or through them or either or any of them and free from all claims, rights, interest or equities of said Receiver or any creditor of or claimant against said Receiver or any person claiming by or through them or any of them, with the exception, however, that the sale of said leases and personal property is made subject to all the terms, conditions and provisions contained in said leases, and that there is not included in said sale oil or oil products on hand on date of delivery of possession, and all said oil and oil products to remain the property of the Receiver, and the office furniture and equipment in the main office at Los Angeles, California, is not included in said sale or sales, nor are any of the assets of the receivership estate, other than said leases and the personal property, located thereon.

That said defendant corporation, its officers, agents, servants and employees and all creditors and stockholders of and claimants against said corporation and each of them and all persons claiming under or through them or any of them and all parties to this proceeding and all creditors of and

claimants against said Receiver and all persons claiming under or through them or any of them are hereby perpetually enjoined, restrained and debarred from asserting or causing to be asserted any claims in or to said leases or the personal property located thereon or any part thereof adverse to the rights and title of the respective purchasers thereof acquired in accordance with this order and from interfering or attempting to interfere in any way with the said rights and title of the respective purchasers or the possession or operation of the properties, under said leases, by said respective purchasers, [178] their respective successors, assigns or personal representatives, and from interfering or attempting to interfere in any way with or preventing or attempting to prevent compliance with or the execution or carrying out of this order by said Receiver or others.

It Is Further Ordered, Adjudged and Decreed that the properties, sale of which is confirmed hereby, the respective purchasers thereof and the respective purchase prices thereof are as follows:

Hillman-Long, Inc., a corporation, which purchased for the sum of $37,000.00 in cash, the following:

Elk Hill Lease

That certain oil and gas lease dated June 1, 1921, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Visalia 09704, and also

known as Sacramento 019477, and Lake View No. 2 Oil Company, a California corporation, as lessee which company's name was changed to Lake View Oil and Refining Company, covering that certain tract of land situated in the Elk Hill oil field and more particularly described as follows:

> W½ NE¼, NW¼, N½ SW¼ and SW¼ SW¼ Sec. 8, T. 31 S., R. 25 E., M. D. M., Kern County, California;

that the Department of the Interior approved the suspension of drilling and producing requirements under said lease and also suspended payment of annual rental effective June 1, 1934; that transfer of title of said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

A. D. Mitchell who purchased for the sum of $48,500.00 in cash, the following: [179]

Pentland Lease

That certain oil and gas lease made and entered into on the 18th day of November, 1927, by and between Carrie Parkinson, a widow, as lessor, and Lake View Oil and Refining Company, a corporation, as lessee, covering the premises described as follows, to-wit:

> The northwest quarter (NW¼) of section four (4) township 11 north, range 23 west, S. B. B. & M., Kern county, California, con-

taining one hundred sixty (160) acres, more or less;

which includes producing wells located thereon; but that Title Insurance and Trust Company of Los Angeles, California, by mesne conveyances now is the owner of said premises; that there is personal property located on said lease consisting of a refinery, derricks, well equipment, buildings, tankage, oil well machinery, boiler plants, machine shop, fire apparatus, trucks, automobiles, field office furniture, houses, household furniture and producing oil wells; that upon transfer of title, assignment of said lease may be subject to the consent of the Title Insurance and Trust Company of Los Angeles; that there is located on said lease as a part of the personal property an electric dehydrating unit C-241, licensed by the Petroleum Rectifying Company, which has been operated by the receivership under a non-assignable License Agreement dated October 1, 1927, and said unit is sold only on condition that the buyer enter into a License Agreement with the Petroleum Rectifying Company covering said unit.

A. D. Mitchell who purchased for the sum of $7,500.00 in cash the following:

1st El Dora (Main) Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, and the El Dora Oil Company of Los Angeles, California, a cor-

pora- [180] tion, lessee, same being Los Angeles Serial No. 033378, covering land described as follows:

> The south half (S½) of the northwest quarter (NW¼) of the southeast quarter (SE¼) of section thirty-two (32), township twelve (12) north, of range twenty-three (23) west, San Bernardino Base and Meridian, Kern County, California;

which includes producing wells located thereon; that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that there is personal property located on said lease consisting of derricks, pipes, casing, machinery, tanks, buildings, appliances and equipment; that transfer of title of said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

A. D. Mitchell, who purchased for the sum of $3100.00 in cash the following:

2nd El Dora-Smith Lease

That certain oil and gas lease dated the 20th day of April, 1922, by and between the United States of America, as lessor, acting in this behalf by the

Secretary of the Interior, and the El Dora Oil Company, as lessee, same being Los Angeles Serial No. 034641, covering land situated in the Sunset field and more particularly described as follows:

> Lot 7, section 6, township 11 N., range 23 W., San Bernardino Meridian, Kern County, California;

that said lease was assigned to the Lake View Oil and Refining Company under date of the 7th day of November, 1927, by F. M. Smith, trustee in bankruptcy of the estate of El Dora Oil Company; that said assignment was approved on December 22, 1927, by the Department of the Interior; that drilling operations were [181] suspended by the Secretary of the Interior on August 28, 1934, and suspension of rentals became effective on April 20, 1934; that transfer of title of said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease. No personal property is located on said lease.

A. D. Mitchell, who purchased for the sum of $9100.00 in cash the following:

Midway Field Lease

That certain oil and gas lease dated the 23rd day of August, 1920, by and between the United States of America, as lessor, acting in this behalf by the Secretary of the Interior, same being Serial Los Angeles 033396a, and Midway Field Oil Company, a corporation, as lessee, covering the follow-

ing described tract of land situated in the county of Kern, California, and more particularly described as follows:

> The north fifty (50) acres of the west one hundred (100) acres of the southwest quarter (SW¼) of section four (4), township eleven (11) north, range twenty-three (23) west, San Bernardino Meridian, Kern county, California;

which includes producing wells located thereon; that said lease and all the physical personal property thereon by mesne conveyances was transferred to the Lake View No. 2 Oil Company, a corporation, (which company's name was changed to the Lake View Oil and Refining Company) on the 27th day of June, 1921, by the Midway Field Oil Company, and the assignment and transfer was approved by the Secretary of the Interior on July 11, 1921; that there is personal property located thereon consisting of derricks, rigs, casing, machinery, equipment, tools and appliances; that transfer of title of said lease is subject to the approval of the Department of the Interior, and subject to a new bond covering said lease.

It Is Further Ordered by the Court that the Receiver hold said funds arising from the sale of said oil leases and [182] personal property located thereon, subject to the further orders of this court.

It Is Further Ordered that this court reserves the power and jurisdiction to make any further

order or orders which the court may deem necessary or advisable to complete the consummation of the sales herein confirmed.

Done this 20 day of January, 1939.

[Seal] WM. P. JAMES,
Judge of the U. S. District Court.

Judgment entered Jan. 20, 1939. Docketed Jan. 20, 1939. Book COBK Page ...., R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy.

[Endorsed]: Filed Jan. 20, 1939, R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk. [183]

[Title of District Court and Cause.]

OBJECTION AND PROPOSED AMENDMENT TO ORDER OF CONFIRMATION OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON OF LAKE VIEW OIL AND REFINING COMPANY.

Now comes F. G. White, through his attorney and counsel, Thornton Wilson, Esq., and in objecting and offering amendments to the order of confirmation of sale of oil leases and personal property located thereon of Lake View Oil and Refining Company, alleges as follows:

OBJECTIONS

F. G. White, as a Director and stockholder of Lake View Oil and Refining Company, objects to the said order of confirmation of sale and any and all parts thereof on the ground that said assets are being sold for grossly inadequate consideration, a consideration so inadequate as to shock the conscience of the Court.

F. G. White proposes that the following amendment be [185] inserted in said order confirming sale to take the place of that portion of the order commencing on line 26, page 3, with the words "and one F. G. White", and ending with the word "sustained" on line 32, page 3, to-wit:

PROPOSED AMENDMENT

That one F. G. White, appearing by counsel Thornton Wilson, Esq., as a Director and stockholder of Lake View Oil and Refining Company, on said 27th day of December, 1938, filed his protest to the confirmation of said sale and in open Court and prior to said confirmation offered to prove as follows:

1. That no appraisement has been made by the Receiver of said oil properties for more than one year last past.

2. That new and deeper oil sands have been discovered on said properties within one year last past.

3. That in the opinion of a recognized petroleum and consulting engineer, who was then and there

present in Court, sworn and offered to testify, the said Pentland lease alone now has a value, because of said discovery of deeper sands, in excess of Two Million Dollars ($2,000,000.00).

4. That by the expenditure of not to exceed $25,000.00 of the $50,000.00 in cash which the Receiver now has on hand, the said wells on the Pentland lease could be lowered to said deeper sands, thereby greatly increasing the present production of said Lake View Oil and Refining Company to such an extent that the creditors could be paid off in full in short order and the properties saved to the stockholders.

5. That in open Court said F. G. White offered to prove all of the above allegations and further prove that in view of said deeper sands it was unnecessary to sell any of the assets of said company, but that the Court sustained objections to said proof and announced that it did not believe any evidence [186] which said F. G. White could offer would change the mind of the Court.

Dated: January 19, 1939.

THORNTON WILSON,

Attorney for F. G. White.

[Endorsed]: Filed Jan. 20, 1939, R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk. [187]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73-d

Notice Is Hereby Given that F. G. White, an objector herein to the sale of the assets of Lakeview Oil and Refining Company, a corporation, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order Confirming Sale entered herein on the 27th day of December, 1938.

Dated this 24th day of March, 1939.

THORNTON WILSON,
Attorney for Objector, F. G. White
Central Bank Building
Oakland, California.

Copy mailed to Bradner & Weil, attorneys for receiver, and to Joseph J. Rifkind, attorney for Oil Well Supply Co., a creditor, 3/27/39. E.L.S.

[Endorsed]: Filed Mar. 27, 1939, R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk. Docketed.

[Endorsed]: No. 9193. U.S.C.C.A. 9th Cir. Filed May 27, 1939. Paul P. O'Brien, Clerk. [187A]

In the District Court of the United States, Southern District of California, Central Division

In Equity No. T-121-J

NORA L. POWERS, et al,

Complainants,

vs.

LAKEVIEW OIL AND REFINING COMPANY, a corporation,

Defendant.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Appellant herein designates the following portions of the record, petitions, documents and orders to be contained in the record on appeal:

1. Receiver's petition for confirmation of sale of personal property of Lakeview Oil and Refining Company.

2. Protest of F. G. White on Hearing of Petition of Receiver for Confirmation of Sale.

3. Order of Confirmation of Sale of Oil Leases and Personal Property Located Thereon of Lakeview Oil and Refining Company.

4. Objection and Proposed Amendment to Order of Confirmation of Sale of Oil Leases and Personal Property Located Thereon of Lakeview Oil and Refining Company.

5. Reporter's transcript stenographically reported at the hearing for confirmation of Receiver's

sale of oil leases and personal property of Lakeview Oil and Refining Company.

Attached hereto are two copies of the Reporter's transcript of the evidence of the proceedings included in this designation.

Dated this 13th day of April, 1939.

THORNTON WILSON
Attorney for Appellant

Receipt of a copy of the within Designation is hereby admitted this 15 day of April, 1939.

BRADNER & WEIL
By A. G. SMITH
R. DECHTER
By E. ZARINGER
JOS. J. RIFKIND
Atty. for Oil Well Supply Co. Creditor

[Endorsed]: Filed Apr. 17, 1939. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [188]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL.

To the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, and to F. G. White, Objector and Appellant Herein, and to Thornton Wilson, Esq., as Attorney:

You and Each of You Will Please Take Notice that B. J. Bradner, as Receiver for Lake View Oil

and Refining Company, designates the following additional portions of the record and proceedings and evidence in the above entitled matter to be contained in the record of appeal in the United States Circuit Court of Appeals for the Ninth Circuit:

1. Order appointing Paul J. Hisey as Receiver for Lake View Oil and Refining Company, a corporation.

2. Order appointing B. J. Bradner as Receiver for Lake View Oil and Refining Company, a corporation.

3. Petition of Receiver for order to sell the leases and the personal property located thereon, filed herein on or about October 19, 1938.

4. Order for hearing on said last mentioned petition.

5. Affidavit of service of notice of hearing on said last mentioned petition, filed herein on or about October 22, 1938.

6. Minutes of October 31, 1938, relating to hearing on said last mentioned petition. [189]

7. Order of sale of oil leases and personal property located thereon of October 31, 1938.

8. Notice of sale of oil leases and personal property located thereon and order approving form of notice, filed herein on or about October 31, 1938.

9. Affidavit of service by mailing of notice of sale, which affidavit was filed herein on or about November 9, 1938.

10. Affidavit of posting of notice of sale, which affidavit was filed herein on or about December 2, 1938.

11. Affidavit of publication of notice of sale of oil leases and personal property located thereon, which affidavit was filed herein on or about December 2, 1938.

12. Receiver's report and return of sale of oil leases and personal property located thereon filed herein on or about December 14, 1938.

13. Order for hearing on petition of receiver for confirmation of sale of oil leases and personal property located thereon, said order being dated December 14, 1938.

14. Affidavit of publication of order for hearing on petition of receiver for confirmation of sale of oil leases and personal property located thereon, which affidavit was filed herein on or about December 17, 1938.

15. Affidavit of service by mailing of copy of order for hearing on petition of receiver for confirmation of sale together with petition of receiver for confirmation of sale, which affidavit is the affidavit of B. J. Bradner, filed herein on or about December 21, 1938.

16. Affidavit of service by mailing of order for hearing on petition of receiver for confirmation of sale, which affidavit is the affidavit of E. C. Perrizo, filed herein on or about December 21, 1938.

17. Affidavit of publication of order for hearing on [190] petition of receiver for confirmation of sale of oil leases and personal property located thereon, filed herein on or about December 23, 1938.

18. Minutes of December 27, 1938, relating to hearing on petition for confirmation of sale.

19. Order of January 13, 1939, fixing time for filing of objections.

20. Affidavit of service of said last mentioned order, which affidavit was filed herein on or about January 14, 1939.

21. Order of confirmation of sale of oil leases and personal property located thereon made and entered on January 20, 1939.

22. Audit of Thomson, Cooper & Thomson, dated April 30, 1938, filed herein on or about June 6, 1938, together with order approving said audit, made herein in October, 1938.

23. Appraisal of Ralph J. Reed, filed herein on or about April 17, 1937, and appraisal of Glen M. Ruby and A. A. Curtice, filed herein on or about April 17, 1937.

Dated this 25th day of April, 1939.

BRADNER AND WEIL,
By JEROLD E. WEIL,
Attorneys for Appellee.
B. J. Bradner, as Receiver for Lake View Oil and Refining Company.

[Endorsed]: Filed Apr. 25, 1939. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[191]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF HEARING ON RECEIVER'S REPORT AND RETURN OF SALE OF CERTAIN OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON, OF LAKE VIEW OIL & REFINING COMPANY, AND PETITION OF B. J. BRADNER, RECEIVER, FOR CONFIRMATION OF SALE OF OIL LEASES AND PERSONAL PROPERTY LOCATED THEREON, FILED 12/14/38, PURSUANT TO ORDER FILED THEREWITH, SETTING THIS DAY FOR HEARING.

Appearances:

Bradner & Weil,
For the Receiver.

J. J. Rifkind, Esq.,
For Oil Well Supply Company, a creditor.

Thornton Wilson, Esq.,
For F. G. White, a director and stockholder.

Raphael Dechter, Esq.,
For A. D. Mitchell, a bidder.

Los Angeles, California,
Tuesday, December 27, 1938, 10 A. M.

Mr. Bradner: If your Honor please, I have just been served with a notice of protest here in the court room, and I suppose the protestant will want to be heard on it.

Mr. Wilson: If the court please, my name is Thornton Wilson, and I represent F. G. White, a director and also a stockholder of the Lake View Oil Company. The protest is quite short, and, with your Honor's permission, I will read it and will ask that it be filed.

The Court: Very well.

Mr. Wilson:

> "Now comes F. G. White and protests the sale of the assets, including various leases and personal property of the Lakeview Oil and Refining Company, and by way of protest alleges:
>
> "I. That he is one of the Directors of the Lakeview Oil and Refining Company, and that he is also a stockholder and represents various stockholders owning large blocks of stock of said corporation.
>
> "II. That if the sale of the assets for the consideration heretofore agreed upon is confirmed, the Receiver will not receive sufficient to pay off the creditors of the corporation in full, and there will be nothing whatsoever remaining for the stockholders of said corporation.
>
> "III. That at the inception of the Receivership herein, the properties which the Receiver now proposes to sell for a total sum of approximately $100,550.00 were appraised at $1,024,965.44, and the total indebtedness of said corporation was approximately $289,549.91;

that said indebtedness has now been reduced to $231,266.76 during said receivership.

"IV. Your petitioner is informed and believes, and therefore alleges, that the Receiver now has on hand sums in excess of $54,000.00. Your petitioner further alleges that the properties which the Receiver proposes to sell were appraised within a year last past for a sum in excess of $158,000.00; that because of new and deeper oil sands which have been discovered, all of said properties have materially increased in value since said appraisement.

"V. Your petitioner further alleges that the proposed sale of each of said leases and assets of the said corporation is for a grossly inadequate consideration.

"VI. That if an appraisement were made at the present time, your petitioner believes and therefore alleges that all of said properties would show a material increase in value, and that the value of a new appraisement would show sufficient assets to pay all creditors in full and still leave a substantial equity for the stockholders of said corporation.

"VII. That if the Receivership were continued and allowed to carry on at its present rate, the creditors would all be paid off in full and the entire properties saved to the stockholders; that your petitioner is informed and believes that the auditor's report herein will show that there has been an operating profit

since the Receivership and during the last eight years in excess of $170,000.00."

The Court: Taking care of depreciation?

Mr. Wilson: Beg pardon?

The Court: Taking care of depreciation meanwhile?

Mr. Wilson: That, your Honor, I am not prepared to answer.

The Court: Well, that is a pretty big item, don't worry about that. I think some of the creditors may be prepared to answer that.

Mr. Rifkind: There has been no reserve for depreciation, obsolescence, etc. We have lived with this thing many years, your Honor.

Mr. Wilson: I realize that your Honor may be very familiar with it.

The Court: Yes; I am.

Mr. Wilson:

"Wherefore, your petitioner prays:

"I. That the confirmation of sale of said assets be denied; or,

"II. In lieu thereof this court continue the hearing on the confirmation of sale for a period of thirty days, and that during the interim this Honorable Court appoint three disinterested parties to make a current appraisement of said properties, and that at least one of said appraisers be a recognized consulting petroleum engineer to be nominated by your petitioner, and that said appraisers be instructed to have said appraisement on file herein at least ten

days prior to said further hearing on confirmation of sale herein."

Followed by the verification of F. G. White.

If I may just add to this statement: We have present in the court room a recognized consulting petroleum engineer with whom we have advised and whom I know your Honor would consider very familiar with the properties if he were allowed to testify.

He informs us that the Elk Hills Lease should not be disturbed; and, to that extent, I wish to modify this petition. I have no objection to the $37,000, approximately, that was bid for the Elk Hills Lease.

As to the Pentland Lease in particular, and in view of the oil reserves which have been discovered only recently, we are prepared to put on testimony to the effect that the lease is worth more than $2,000,000.

The Court: That is, you mean the gambler's chance of the oil being discovered in closer quarters?

Mr. Wilson: Not a gambler's chance, hardly, in view of the testimony which we would be glad to present to your Honor. Mr. Suverkrop (?) is in the court room.

Mr. Rifkind: May it please the court, I represent the Oil Well Supply Company, a creditor to the extent of some $15,000 to $20,000—I do not remember the exact amount—and we are in favor of the confirmation of the sale as returned, or any

better offer that can be obtained in price here today.

In connection with the matter, let me state that a receiver was appointed for the Lake View Oil and Refining Company in March, 1931. In other words, this property has been in custodia legis for approximately eight years. It seems to me that the first and foremost consideration is that of the creditors; secondarily, that of the stockholders.

This court, approximately a year ago, appointed three competent appraisers to make an appraisement of this property, and an appraisement was made showing the value of this property to be approximately $150,000. On July 27th of this year a meeting was held at the Bank of America National Trust and Savings Association at which there was then and there present an overwhelming majority of creditors, and I would say an overwhelming number of creditors. In other words, I am definite that the creditors then and there represented would be around 80 to 90 per cent of the creditors; and I am also satisfied there was a majority in number present, too. I have here the assistant vice-president of the Bank of America who may be able to enlighten us as to that if that becomes necessary. At that particular time it was the unanimous opinion of all the creditors there and then assembled—and I want to say that some of the men who were present were not only creditors but experienced business men and experienced oil men. For instance, we had a representative there of the Union Oil Company; we had a repre-

sentative of the O. C. Fields Gasoline Company; we had a representative there of Oil Well Supply Company; we had a representative of the Republic Supply Company; we had representatives of the Bank of America, and other men—yes; representatives of the Taft Well Drilling Company, and other representatives of that type, and they unanimously were in favor of the immediate liquidation, immediate sale of the property in this receivership so that it be converted into cash and dividends be paid to the creditors.

We are not interested in speculation; we are not interested in potential profits. Surely, there must be some potential profits. I suppose any buyer who makes a bid figures that, but we can't go on indefinitely. We have had more than a reasonable opportunity for this thing to work itself out in the natural course of events, and surely the time has come when this receivership should be liquidated.

Your Honor will further recall that that meeting appointed a committee consisting of Clarence Hanson, attorney for the Bank of America, myself, as attorney for the Oil Well Supply Company, and Adolph Ramish, representing himself, a committee of creditors called upon your Honor shortly after July 20, 1938, and conveyed to your Honor that it was the consensus of opinion of the creditors of this estate that the assets be liquidated and sold as soon as possible, and requested your Honor to direct and instruct the Receiver accordingly. Pursuant to that the Receiver did get busy, advertised it and

a sale *as* been effected, and unless there is a higher and better bidder for cash today, we recommend that the sale be confirmed.

We do not feel that the protest is in order. If there are any higher bids, let them come forward, let them produce higher bidders. But merely because they may say there is some future or potential possibility, I do not think it should enter into the case.

Mr. Wilson: Now, if the court please, the present bid is approximately two-thirds of the appraisement of about a year ago. We are prepared to offer testimony that within the last year oil sands have been discovered which make this property, if it were appraised today, ten times the value of the appraisal of a year ago. True, a great many creditors have met—no doubt they have met often. They are anxious to have their money even if they take 50 cents on the dollar. I did not hear him say that petroleum engineers were there and others who were interested in telling the Receiver what the real value of the property is.

The Court: Why have not these stockholders who now appear to oppose the liquidation, after all these years from 1931—why haven't they gathered together some good buyer who would raise this price if it is so valuable, I will say that I have determined not to carry on this receivership any longer. It has been here too long. I would not do it.

Mr. Wilson: May we offer testimony, your Honor, as to the value of the property of the Pentland Lease?

The Court: If you wish to make a point of it I will allow you to make your offer and have an exception to it. But it is not going to change my mind at the present time because these things have been advertised; we have had meetings and hearings; we have had reports of the Receiver, and everybody has had a chance to tell us anything that there was to be told, and it was finally, after carrying on and carrying on a long time, determined this Receiver cannot maintain that management profitably. To be sure, there is a little profit shown but I will venture to say he will tell you that he has not charged a cent of depreciation against it. And where are you?

No. 2: There is no Receiver who, for a great length of time, can properly operate an oil producing property for the reason that, as the years go by, development is needed to keep up the profit and quantity. No creditor nor group of creditors would come in here and attempt to prove before the court that the borrowing of $100,000 to put down an oil well was profitable; neither would the court order it. So the natural progress is that they depreciate and depreciate, and you have not only a sample of it in this case—striking in this case—but in other cases.

If you wish to make an offer for the purpose of the record the reporter may take it down, I will rule on it and you have your exception.

Mr. Wilson: Thank you, your Honor. Mr. Suverkrop.

Mr. Dechter: May I make an observation, your Honor, that this protest comes too late?

The Court: What I mean just for the moment, counsel, is that you express yourself that you now produce a witness and that you offer to prove thus and so, and I will deny your right to do that, and that you will preserve your exception, without putting the witness on the stand.

Mr. Wilson: Thank you. You may sit down, Mr. Suverkrop.

Mr. Dechter: I would like to call your attention to the fact that the record shows that your Honor ordered this sale to be made at public auction at Bakersfield, Kern County, the county in which the property is located, that in the order thus made, in the notice to creditors, notice to the public and the advertisements, it was definitely stipulated that this court would accept a bid of $75,000 if no better bid was received. No objection was made to that procedure being taken. I think the motion should have been made before the Receiver had gone to the expense of a sale advertisement and before the court had made the order. A stockholder at that time could have asked for an order limiting the sale to a certain amount. It seems to me that the protest and motion to vacate the sale comes too late at the present time.

The Court: Make your record. The remarks are in the record and counsel can make his offer of proof now.

Mr. Wilson: There is present in the court room now Mr. Lew Suverkrop, a recognized petroleum and consulting engineer and geologist, for many years with the Department of the United States government a man owning adjoining property, prepared to testify that within the past year other and deeper sands have been discovered in cross-sections adjoining this property, which definitely prove that there are deeper and better sands particularly on the Pentland Lease, from which any petroleum engineer would conclude that these properties—the Pentland Lease in particular alone—has a reserve value of in excess of $2,000,000; that if the Receiver would use $150,000 with $50,000 he now has on hand to deepen his present wells, within a very short time he would have sufficient profits from the wells on the Pentland Lease alone to pay all of the creditors, and that after the creditors were paid the stockholders would receive back their company intact.

The Court: The offer at this time——

Mr. Wilson: I think that about covers it.

Mr. Rifkind: May it please the court, at this time I would like to make an objection for the record upon the ground that the testimony proposed to be produced and offered is incompetent, irrelevant and immaterial; that the only purpose of this meeting is to confirm this sale or any higher bid,

and unless there is a higher bid there is no issue before this court.

Mr. Wilson: Of course, it is recognized, your Honor, that we have three months within which to appeal; that the sale would not become final until that time, and we are merely trying to perfect the record because we do intend to appeal if this sale is confirmed.

The Court: That the record may be complete in favor of the offering party, the offer which counsel now expresses, and produces a witness asking that he be sworn, is refused by the court and exception noted. Furthermore, the court is of the opinion that the objections as expressed by other counsel should be sustained, and they are sustained and exception will show in favor of the offering party.

Did you have anything to say, Mr. Bradner? You have had this matter under consideration.

Mr. Bradner: Nothing, except to take up the matter of the confirmation.

The Court: You can proceed as the auctioneer. It is the custom that the Receiver acts as auctioneer.

Mr. Bradner: The Pentland was bid in by $45,500. Is there any further or better offer on the Pentland Lease at this time?

The Court: I will state preliminarily that we will take up the separate offers on the separate leases, and in conclusion, if there is any one bidder who will bid on the whole for an aggregate higher price his bid will be considered.

Mr. Bradner: It is $48,500 that Mitchell has offered for the Pentland Lease. Is there any further or greater offer being made at this time?

The Court: Any bidder's voice will be heard. It seems now to be the highest bid and will be confirmed unless there is an aggregate bid that overreaches. Proceed with the next one.

Mr. Bradner: The El Dora (main) lease, the offer of Dick Mitchell was $3,750. Is there any further or greater offer made for that lease at this time?

Mr. Gordon Holmes: Yes, your Honor. May I bid $4,300?

Mr. Bradner: You will have to come forward with your name.

Mr. Holmes: Gordon Holmes.

Mr. Bradner: Gordon Holmes bids $4,200.

Mr. Holmes: $4,300.

Mr. Bradner: $4,300. Is there any further or greater bid made than $4,300 for the El Dora (main) lease?

Mr. A. D. Mitchell: $4,500.

Mr. Bradner: Who is making that?

Mr. Mitchell: A. D. Mitchell.

Mr. Bradner: Mitchell raises it to $4,500. Any further or greater bid than $4,500?

Mr. Holmes: $4,600—Holmes.

Mr. Bradner: $4,600 by Holmes.

Mr. Mitchell: Forty-seven.

Mr. Bradner: Forty-seven, Mitchell.

Mr. Holmes: Forty-eight hundred.

Mr. Mitchell: Forty-nine.

Mr. Holmes: Five thousand, Holmes.

Mr. Mitchell: Five thousand one hundred.

Mr. Bradner: Just a little slower. We can't keep up with you. The last bid was $5,100 by Holmes?

The Clerk: No; by Mitchell.

Mr. Holmes: Fifty-two hundred.

Mr. Mitchell: Fifty-three hundred.

Mr. Holmes: Fifty-four hundred by Holmes.

Mr. Dechter: I would like to know if Mr. Holmes has shown he is qualified to bid. Mr. Mitchell has put up the necessary deposit and assured the Receiver that he is qualified. We have no assurance on the part of Mr. Holmes. We require a cashier's check of at least ten per cent to be a bidder.

Mr. Bradner: Here is a cashier's check for $5,000.

The Court: $5,400 by Mr. Holmes is the last bid.

Mr. Mitchell: Fifty-five hundred.

Mr. Bradner: Mitchell, fifty-five hundred.

Mr. Holmes: Fifty-six.

Mr. Mitchell: Fifty-seven.

Mr. Holmes: Fifty-eight.

Mr. Mitchell: Fifty-nine.

Mr. Holmes: Sixty.

Mr. Mitchell: Sixty-one.

Mr. Holmes: Sixty-two.

Mr. Mitchell: Sixty-three.

Mr. Holmes: Sixty-four.

Mr. Mitchell: Sixty-five.

Mr. Holmes: Sixty-six.

Mr. Mitchell: Sixty-seven.

Mr. Holmes: Sixty-eight.

Mr. Mitchell: Sixty-nine.

Mr. Holmes: Seventy.

Mr. Mitchell: Seventy-one.

Mr. Holmes: Seventy-two.

Mr. Mitchell: Seventy-three.

Mr. Holmes: Seventy-four.

Mr. Mitchell: Seventy-five.

Mr. Holmes: You have bought an oil well.

Mr. Bradner: Who was the last bidder, Mitchell?

The Clerk: Mitchell.

Mr. Bradner: Any further or greater bid than $7,500? Third and last call for the first at $7,500; third and last call for the second time, $7,500 for the El Dora (main) lease.

The Court: The bid will be approved unless there is an aggregate higher bid on the whole property.

Mr. Bradner: Now, the El Dora-Smith lease. The bid was by Dick Mitchell for $3,150. Any further or greater bid on the El Dora-Smith lease? Do I hear any further bid? Apparently no further bid, your Honor.

The Court: It will be approved subject to an aggregate bid being in excess.

Mr. Bradner: The Elk Hills Lease, offer of Hillman-Long $37,000. Any further or greater bid for the Elk Hills Lease at this time?

The Court: It will be approved with the same condition.

Mr. Bradner: Midway Field Lease to Bishop Oil Company for $8,200. Any further or greater bid for that at this time?

Mr. Mitchell: $8,500.

Mr. Bradner: Mitchell bid how much, $8,500?

The Court: Anybody raise $8,500?

Bishop Oil Company: $8,600.

Mr. Mitchell: Eighty-seven.

Mr. Bradner: Mitchell eighty-seven. Any further bid?

Bishop Oil Company: Eighty-eight.

Mr. Mitchell: Eighty-nine.

Bishop Oil Company: Nine thousand.

Mr. Mitchell: Ninety-one hundred.

Mr. Bradner: Mitchell ninety-one hundred. Any further bids? Anybody want to pay more than $9,100 for the Midway Field property?

The Court: It will be approved to Mr. Mitchell.

Mr. Bradner: Your Honor, we will have to add a little total here in order to see where we are. I make a total of $105,200. That seems to check with Mr. Wire. Is that the figure you make?

The Court: Yes. The total offer is $105,200 for all the property which has been bid upon separately. If that total amount for all the property is increased by any bidder by some reasonably material amount, it will be accepted rather than a separate bid for each property. I hear none, so I

will confirm the bids we have. Draw the necessary order, Mr. Bradner.

[Endorsed]: Filed April 15, 1934.

[Endorsed]: No. 9193. United States Circuit Court of Appeals for the Ninth Circuit. F. G. White, Appellant, vs. B. J. Bradner, as Receiver for Lake View Oil and Refining Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 24, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals

No. 9193

F. G. WHITE,

Appellant,

vs.

B. J. BRADNER, as Receiver for Lakeview Oil and Refining Company,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND PORTIONS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF.

POINTS

1. That the Honorable District Court abused its discretion in confirming the sale of the assets of the Lakeview Oil and Refining Company for a grossly inadequate consideration—so gross as to shock the conscience of the Court.

2. That the Honorable District Court erred in sustaining objections of counsel for the Receiver and the objections of counsel for various purchasers of the property to the effect that testimony as to the value of the assets sold upon a hearing for the confirmation of said sale is incompetent, irrelevant and immaterial.

3. That the Honorable District Court erred in sustaining the contention of counsel for the Receiver and counsel for various purchasers of the

property that the only purpose of the hearing on the confirmation of the sale is to confirm the sale or any higher bid and that unless a higher bid is made, there could be no issue before the Court.

4. That the Honorable District Court abused its discretion and erred in refusing to permit testimony to be introduced by objectors to the confirmation of the sale who represented the directors and stockholders of the corporation, with regard to the value of the properties sold, particularly in view of the offer of objectors to prove that new sands on said properties had been discovered since the last appraisement thereof which had increased the appraised value from $150,000.00 to $2,000,000.

5. That the Honorable District Court erred and abused its discretion, in that the mind of the Court, as announced by the Court prior to its refusal to allow testimony of values to be offered, had been theretofore made up.

PORTIONS OF RECORD RELIED UPON BY APPELLANT AND WHICH APPELLANT THINKS NECESSARY FOR A CONSIDERATION OF THE ABOVE POINTS.

1. Notice of Appeal. Record, page ....
[See page 153 of this Printed Record.]

2. Petition of Receiver for confirmation of sale of oil leases and personal property located thereon of Lakeview Oil and Refining Company, excluding exhibit attached thereto. Page 131 of Record.
[See page 105 of this Printed Record.]

3. Order of District Court for hearing on petition of Receiver for confirmation of sale of oil leases and personal property located thereon of Lakeview Oil and Refining Company. Page 138 of Record.

[See page 118 of this Printed Record.]

4. Protest of F. G. White on hearing of petition of Receiver for confirmation of sale of oil leases and personal property located thereon of Lakeview Oil and Refining Company. Page 165 of Record.

[See page 126 of this Printed Record.]

5. Minutes of hearing on Tuesday, December 27, 1938, before William P. James, District Judge, of proceedings at hearing for confirmation. Page 168 of Record.

[See page 129 of this Printed Record.]

6. Order for confirmation of sale of oil leases and personal property located thereon of Lakeview Oil and Refining Company. Page 172 of Record.

7. Objections and proposed amendments to order of confirmation of sale of oil leases and personal property located thereon of Lakeview Oil and Refining Company. Page 185 of Record.

[See page 151 of this Printed Record.]

8. Appellant's designation of contents of record on appeal signed by Thornton Wilson and showing admissions of service. Page 188 of Record.

[See page 154 of this Printed Record.]

9. Reporter's transcript of hearing on Receiver's report and return of sale and petition for confirmation of sale, held on December 27, 1938. Page .... of Record.

[See page 159 of this Printed Record.]

Dated: May 27, 1939.

Respectfully submitted,

THORNTON WILSON,

Attorney for Appellant.

Docketed.

[Endorsed]: Filed May 28, 1934.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD WHICH APPELLEE B. J. BRADNER, AS RECEIVER FOR LAKE VIEW OIL AND REFINING COMPANY, THINKS MATERIAL FOR THE CONSIDERATION OF THE POINTS STATED BY APPELLANT.

The additional parts of the record hereby designated by said appellee are as follows:

1. Appraisal of Ralph J. Reed of Production, Equipment and Refinery (page 9 of Record).

[See page 2 of this Printed Record.]

2. Appraisal of Underground Reserves (page 26 of Record).

[See page 18 of this Printed Record.]

3. Audit of Thomson, Cooper & Thomson (page 60 of Record).

[See page 43 of this Printed Record.]

4. Order approving audit of Thomson, Cooper & Thomson (page 73 of Record).

[See page 68 of this Printed Record.]

5. Petition of Receiver for Order to Sell Leases and Personal Property (page 75 of Record).

[See page 69 of this Printed Record.]

6. Order for Hearing on Petition of Receiver for Order to Sell Leases, etc., (page 82 of Record).

[See page 79 of this Printed Record.]

7. Affidavit of service of Notice of Hearing on Petition to sell Leases, etc., (page 83 of Record).

[See page 80 of this Printed Record.]

Exhibit "A", List of Creditors and Stockholders, attached to said affidavit, but deleting therefrom all names except the name of "Floyd G. White" or "F. G. White", which name is to be printed, and said exhibit as printed to show that other names have been deleted (page 84 of Record). Exhibit "B", Notice of Hearing, attached to said affidavit (page 97 of Record).

[See page 82 of this Printed Record.]

8. Notice of Hearing on Petition to Sell Leases (page 97 of Record).

[See page 82 of this Printed Record.]

9. Order, Minutes, of October 31, 1938, granting petition of Receiver for order to sell leases, etc., (page 99 of Record).

[See page 85 of this Printed Record.]

10. Order for Sale of Oil Leases and Personal Property (page 100 of Record).

[See page 86 of this Printed Record.]

11. Notice of Sale of Oil Leases and Personal Property (page 107 of Record).

[See page 95 of this Printed Record.]

12. Affidavit of service by mailing of Notice of Sale (page 113 of Record). Exhibit "A", list of Creditors and Stockholders, attached to said last mentioned affidavit, but deleting therefrom all names except the name of "Floyd G. White" or "F. G. White", which name is to be printed, and said exhibit as printed to show that other names have been deleted (page 114 of Record). Exhibit "B", Notice of Sale attached to said last mentioned affidavit (page 117 of Record).

[See pages 103-105 of this Printed Record.]

13. Exhibit "A", Description of Property, attached to petition, Receiver's, for confirmation of sale, (which petition without said exhibit has been designated by appellant) (page 137 of Record).

[See page 113 of this Printed Record.]

14. Order of January 13, 1939, fixing time for filing of objections (page 170 of Record), together with Affidavit of service of said last mentioned Order (page 171 of Record).

[See page 133 of this Printed Record.]

15. Designation of Contents of Record on Appeal, appellee's (page 189 of Record).

[See page 155 of this Printed Record.]

Note: Exhibit "B" designated in No. "7", is a copy of the Notice of Hearing designated in No. "8". Duplication is probably unnecessary if some proper reference can be made. Same is true as to Notice of Sale designated in No. "11" and Exhibit "B" designated in No. "12".

BRADNER AND WEIL,
By JEROLD E. WEIL,
Attorneys for said Appellee.

AFFIDAVIT OF SERVICE BY MAIL
(C. C. P. 1013a)
(Must be attached to original or a true copy of paper served)
No. 9193

State of California
County of Los Angeles—ss.

Yonda Salter, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action.

That affiant's business address is 1120 Rowan Building, Los Angeles, California. That affiant served a copy of the attached Designation of additional parts of the record which appellee B. J. Bradner, as Receiver for Lake View Oil and Refining Company, thinks material for the consideration of the points stated by appellant, by placing said copy in an envelope addressed to Thornton Wil-

son, Esq., at his office address, which is Central Bank Building, Oakland, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on June 8, 1939, deposited in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

YONDA SALTER.

Subscribed and sworn to before me June 8, 1939.

[Seal] B. J. BRADNER,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jun. 9, 1939.

No. 9193

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. G. WHITE, *Appellant*, vs. B. J. BRADNER, as Receiver for Lake View Oil and Refining Company, A. D. MITCHELL, and OIL WELL SUPPLY COMPANY (a corporation), *Appellees.*	

BRIEF FOR APPELLANT.

THORNTON WILSON,
Central Bank Building, Oakland, California,
Attorney for Appellant.

FILED
AUG 31 1939
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9193

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. G. White,

Appellant,

vs.

B. J. Bradner, as Receiver for Lake View Oil and Refining Company, A. D. Mitchell, and Oil Well Supply Company (a corporation),

Appellees.

BRIEF FOR APPELLANT.

JURISDICTION OF THE DISTRICT COURT OF THE UNITED STATES.

The Statute of the United States affecting Sales by United States Courts, is the Act of March 3, 1893, ch. 225, sections 1, 2 and 3, 27 Stat. 751; 28 U. S. C. A. sections 847, 848 and 849.

JURISDICTION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Section 230 of the Judicial Code reads as follows:

"Time for making application for appeal. No appeal intended to bring any judgment or decree

before a Circuit Court of Appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Federal Code Annotated, Vol. 7, p. 772.

An order confirming a sale of real estate by a Receiver is appealable.

High on Receivers, 4th Edition, p. 232;
Sage v. Railroad Co., 96 U. S. 712 at p. 714.

PLEADINGS SHOWING THE EXISTENCE OF THE ABOVE JURISDICTIONS.

The Receivership action herein is known as Equity No. T-121-J in the District Court of the United States for the Southern District of California, Central Division, and entitled "Nora L. Powers, et al., Complainants, v. Lake View Oil and Refining Company, a corporation, Defendant". (R. p. 1.)

An order confirming the sale of the assets of the Receivership was made by the said District Court on the 27th day of December, 1938 (R. pp. 174-175), and thereafter a formal confirmation order was signed on January 20, 1939. (R. pp. 135-150.) The appellant, a stockholder of said Lake View Oil and Refining Company, had theretofore appeared at the hearing of the petition to confirm the sale and had entered written objections thereto. (R. pp. 160-163.) These objections were denied and exceptions reserved. (R. pp. 166-169.) Appellant likewise offered testimony as to the known present value of the properties

and the offer of testimony was refused. (R. pp. 163-169.)

Appellant's notice of appeal was filed March 29, 1939. (R. p. 153.)

STATEMENT OF CASE GIVING RISE TO THE PRESENT APPEAL.

At the hearing upon the petition for confirmation of the sale herein, the appellant duly entered a protest setting forth that the properties were being sold for a grossly inadequate consideration and that a current appraisement of the properties would show a material increase in value sufficient to pay all creditors and leave a substantial equity for the stockholders of the corporation. (R. p. 161.)

At said hearing appellant offered the testimony of a recognized petroleum engineer to the effect that since the last appraisement under the Receivership, the Pentland Lease had increased in known value, due to the discovery of deeper oil sands, to a sum in excess of $2,000,000. The Court ruled that appellant could make his offer, but that it was not going to change the Court's mind. (R. p. 167.) In this connection, the following testimony took place:

> "Mr. Wilson. May we offer testimony, your Honor, as to the value of the property of the Pentland Lease?
>
> The Court. If you wish to make a point of it, I will allow you to make your offer and have an exception to it. But it is not going to change my mind at the present time because these things have been advertised; * * *"

After some further remarks, the Court stated:

> "If you wish to make an offer for the purpose of the record, the reporter may take it down, I will rule on it, and you have your exception.
>
> Mr. Wilson. Thank you, your Honor. Mr. Suverkrop. * * *
>
> The Court. What I mean just for the moment, counsel, is that you express yourself that you now produce a witness and that you offer to prove thus and so, and I will deny your right to do that, and that you will preserve your exception, without putting the witness on the stand. * * * (R. pp. 167-168.)
>
> * * * * * * *
>
> Mr. Wilson. There is present in the courtroom now Mr. Lew Suverkrop, a recognized petroleum and consulting engineer and geologist, for many years with the Department of the United States government, a man owning adjoining property, prepared to testify that within the past year other and deeper sands have been discovered in cross-sections adjoining this property, which definitely prove that there are deeper and better sands particularly on the Pentland Lease, from which any petroleum engineer would conclude that these properties—the Pentland Lease in particular along—has a reserve value of in excess of $2,000,000. * * * (R. p. 169.)
>
> * * * * * * *
>
> The Court. That the record may be complete in favor of the offering party, the offer which counsel now expresses and produces a witness asking that he be sworn, is refused by the Court and exception noted. Furthermore, the Court is of the opinion that the objections as expressed by other counsel should be sustained and they are

> sustained and exception will show in favor of the offering party." (R. p. 170.)

The objections as expressed by other counsel and sustained by the Court, were as follows:

> "Mr. Dechter. May I make an observation, your Honor, that this protest comes too late? (R. p. 168.)
>
> Mr. Rifkind. May it please the Court, at this time I would like to make an objection for the record upon the ground that the testimony prepared to be produced and offered is incompetent, irrelevant and immaterial; that the only purpose of this meeting is to confirm this sale or any higher bid and unless there is a higher bid there is no issue before this Court." (R. 169-170.)

Thereafter the sale of the Pentland Lease for $48,-500 to the Respondent A. D. Mitchell was confirmed. (R. p. 171.)

It thus appears that the Honorable District Court at the hearing on confirmation refused to hear any evidence as to the value of the properties sold because, as the Court stated, such evidence would not change the Court's mind (R. p. 169), and because the Court was of the opinion that the only purpose of the hearing upon the petition for confirmation was to confirm the sale or any higher bid. (R. pp. 169-170.) As is indicated by appellant's statement of points upon which he relies in this present appeal (R. p. 176) it is believed that the honorable District Court was in error as to the discretion allowed it upon a hearing of a Petition for confirmation of sale

and that either because of this mistaken view as to the limitations of its discretion or because of the fact that the Court's mind was already made up, appellant has been denied a substantial right to a fair consideration of his objections to the confirmation of the sale. Appellant likewise makes the point (R. p. 176) that the evidence herein reveals that the sale was confirmed for a grossly inadequate consideration—so gross as to shock the conscience of this Court.

ARGUMENT.

I.

THE SALE OF THE ASSETS HEREIN WAS FOR A GROSSLY INADEQUATE CONSIDERATION—SO GROSS AS TO SHOCK THE CONSCIENCE OF THE COURT. UNDER SUCH CIRCUMSTANCES, THE SALE SHOULD BE SET ASIDE.

Since the offer of proof was overruled, it is conceded by the Court that the facts embodied in the offer would have been proved by the witness had he been allowed to testify. Thus in a suit involving the validity of a will when an offer to prove certain facts was overruled, the upper Court on appeal, expressed the general rule as follows:

> "By overruling the offer, the Court, in effect, conceded that the witness, if permitted, could prove the facts embodied in it, and the only question open is whether such facts are relevant and material to the issue which the Jury have been sworn to try."
>
> *Griffith v. Venzinger* (Md.), 125 A. 512.

See also:

Norfolk, etc. R. R. Co. v. Fort Dearborn Co., 280 Fed. 264;

64 *C. J.* Sec. 155.

In view of the fact that the offer of proof was overruled, which offer must be taken as establishing the facts as to the value of the Pentland Lease, it appears that this Lease, having a value in excess of $2,000,000 was sold for $48,500, or less than one-fortieth (1/40) of its value. Clearly such gross inadequacy of price is sufficient to shock the conscience of the Court and the sale should be set aside.

A sale will be set aside because of inadequacy of price if the inadequacy is so gross as to shock the conscience of the Court.

Graffam v. Burgess, 117 U. S. 180, at 191-2;

In re Jewett & Sowers Oil Co., 86 Fed. (2d) 497 at 498;

Hungerford v. Owen Magnetic Motor Car Corp., 277 Fed. 244.

II.

WHERE RELIEF, LYING WITHIN THE SOUND DISCRETION OF THE COURT, IS REFUSED ON THE GROUND OF WANT OF POWER TO GRANT IT OR UPON ANY OTHER GROUND THAT PROVES THE NON-EXERCISE OF THAT DISCRETION, SUCH DECISION WILL BE REVERSED.

There can be no doubt but that the Court at the hearing on the Petition for Confirmation had the

discretion to set the sale aside, as long as this discretion was not exercised arbitrarily.

Stokes v. Williams, 226 Fed. 148;
Smith v. Hill, 5 Fed. (2d) 188.

But where, as in the present case, it appears that the Court wholly fails and refuses to exercise its discretion because of a supposed lack of authority, as is indicated by the fact that the Court sustained objections to the effect that the only purpose of the hearing on confirmation was to confirm the sale or any higher bid (R. pp. 169-170), or because of the fact, if it was a fact, that the Court's mind was already made up, as is indicated by the Court's statement that appellant could make an offer but it would not change the Court's mind (R. p. 167), it is shown that appellant has been denied his legal right to require the Court to entertain the question on its merits.

Maddox v. United States, 146 U. S. 140;
Herman v. American Bridge Co., 167 Fed. 930.

As stated in *Bowers on Judicial Discretion of Trial Courts,* Section 21:

> "It is not as a matter of benevolence that litigants are to receive due consideration of all rights that the law permits them to submit to the decision of the Courts; but the right is absolute and the inescapable duty rests upon the Courts to give that full and fair consideration to every claim of right that the parties may properly submit to them. So, when such a claim is presented, and in respect thereto, the duty of the Court to act upon it is clear, action must be taken, even though there is lodged in the decid-

ing Court a discretion as to what the decision will be. And if the Court fails to perceive this discretion, or, perceiving it, refuses to exercise it, the result is the same, for on appeal, reversal will occur, to the end that the party entitled thereto shall have his asserted right passed upon by the proper Court. Tersely stated: 'It is elementary that if relief lying within the sound discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the non-exercise of that discretion, such decision will be reversed, and the case remanded, with a direction to exercise the discretion. Seibert v. Minn. etc. R. Co. (Minn.), 57 N. W. 1068.''

CONCLUSION.

Since the offer of proof which was refused is tantamount to actual proof that the sale of the Pentland Lease was confirmed for a grossly inadequate price and less than one-fortieth (1/40) of its actual value, the sale should be set aside, or in the alternative, it being obvious that there has been a non-exercise of the Court's judicial discretion, the decision of the Court in confirming the sale should be reversed and the case remanded with a direction to exercise the discretion.

Dated, Oakland, California,
August 30, 1939.

Respectfully submitted,
THORNTON WILSON,
Attorney for Appellant.

No. 9193.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

F. G. WHITE,

Appellant,

vs.

B. J. BRADNER, as Receiver for the Lake View Oil and Refining Company; A. D. MITCHELL and OIL WELL SUPPLY COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES B. J. BRADNER, AS RECEIVER, AND OIL WELL SUPPLY COMPANY, A CORPORATION.

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OCT 7 - 1939
PAUL P. O'BRIEN,

Parker & Baird Company, Law Printers, Los Angeles.

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No. 9193.

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F. G. WHITE,

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B. J. BRADNER, as Receiver for the Lake View Oil and Refining Company; A. D. MITCHELL and OIL WELL SUPPLY COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES B. J. BRADNER, AS RECEIVER, AND OIL WELL SUPPLY COMPANY, A CORPORATION.

Statement of Case Giving Rise to the Present Appeal.

We feel it necessary, in order that the court may be fully informed, to make a statement of facts for the reason we consider that the statement made by appellant omits many material facts and circumstances.

The receivership action has been pending since May, 1931, and, taking appellant's own figures as set forth in his protest, there are still unpaid claims in excess of $200,000.00 [R. p. 127] out of approximately $300,000.00 general claims [R. p. 44]. In addition there is a contin-

gent joint venture interest of one John H. Fisher in the production from certain wells in an amount of approximately $78,000.00, which is subordinate to the claims of other creditors [R. p. 45], but to which the rights and interests of the corporation and its stockholders are subject.

On October 19, 1938, the Receiver filed his petition for an order authorizing him to sell five oil leases and the personal property appertaining thereto for $75,000.00 [R. pp. 69-79]. These leases constitute the major part of the receivership assets. On the same date the court made its order setting said petition for hearing on October 31, 1938, and directing written notice to be given by mail to creditors and stockholders [R. pp. 79-80]. On October 20, 1938, notice of the hearing was mailed to the creditors and stockholders, including as a stockholder Floyd G. White, the appellant herein [R. pp. 80-82]. The notice so mailed specifically referred to the fact that it was proposed to sell the leases for $75,000.00 [R. pp. 82-84].

On October 31, 1938, the petition came on for hearing, and various creditors urged that a sale be made [R. pp. 84-85]. No objection was made by appellant F. G. White, nor by anyone else [R. pp. 85, 86].

On October 31, 1938, the court made its order providing for the sale of said leases at public auction on December 10, 1938, at a sum of not less than $75,000.00 [R. pp. 86-95]; the order also provided for the publication of a notice of sale [R. p. 89]. The form of notice was approved by the court [R. pp. 95-103]. This notice of sale expressly mentioned the price of $75,000.00 [R. p. 101].

A copy of the notice of sale was mailed on November 4, 1938, to each of the creditors and stockholders, includ-

ing as a stockholder the appellant Floyd G. White [R. pp. 103-104].

As appears from the petition of the Receiver for confirmation, the public sale was held on December 10, 1938, as provided for in the prior order of court, and after publication of notice, etc., at which sale A. D. Mitchell was the highest bidder for the Pentland Lease at $48,500.00, and for the 1st ElDora (Main) Lease at $3,750.00, and for the 2nd ElDora-Smith Lease at $3,100.00, and Bishop Oil Company was the highest bidder for the Midway Field Lease at $8,200.00 and Hillman-Long, Inc., was the highest bidder for the Elk Hill Lease at $37,000 00, the aggregate bids for all five leases being $100,550.00.

It should be mentioned here that the sale of the Elk Hill Lease is no longer involved in this appeal, as the appeal has been dismissed as to said lease.

The court made its order setting the petition for confirmation for hearing on December 27, 1938 [R. pp. 118-126].

The appellant F. G. White for the first time, at the time of said hearing on December 27, 1938, filed his protest [R. pp. 126-129].

It should be noted that neither by the written protest nor the statements of counsel in presenting the same was there any suggestion that a higher bid could or would be secured but, on the contrary, the suggestion was that the receivership should be continued [R. pp. 126-129], and the suggestion was made that the Receiver should use the $50,000.00 cash which he had on hand and $150,000.00 more (which presumably would have to be borrowed) to deepen the wells on the property [R. p. 169].

It appeared at the hearing that the creditors were in favor of a sale of the assets at that time to the highest bidders [R. pp. 163-166].

It appeared at the hearing that an appraisement had been made approximately a year before, showing the value of the property to be approximately $150,000.00.

The offer of proof made included the offer of testimony

> "that if the Receiver would use $150,000 with $50,000 he now has on hand to deepen his present wells, within a very short time he would have sufficient profits from the wells on the Pentland Lease alone to pay all of the creditors, and that after the creditors were paid the stockholders would receive back their company intact" [R. p. 169].

It should also be noted that the testimony offered was such as could obviously amount to no more than the opinion of a petroleum engineer based on the alleged discovery of deeper sands on other properties, and without even an offer to show that any production had been secured from said alleged deeper sands [R. p. 169].

As bearing upon the reasons which motivated the court in refusing the offered testimony, the following from the record of the proceedings should be noted:

> "Mr. Rifkind: May it please the court, I represent the Oil Well Supply Company, a creditor to the extent of some $15,000 to $20,000—I do not remember the exact amount—and we are in favor of the confirmation of the sale as returned, or any better offer that can be obtained in price here today.
>
> "In connection with the matter, let me state that a receiver was appointed for the Lake View Oil and Refining Company in March, 1931. In other words,

this property has been *in custodia legis* for approximately eight years. It seems to me that the first and foremost consideration is that of the creditors; secondarily, that of the stockholders.

"This court, approximately a year ago, appointed three competent appraisers to make an appraisement of this property, and an appraisement was made showing the value of this property to be approximately $150,000. On July 27th of this year a meeting was held at the Bank of America National Trust and Savings Association at which there was then and there present an overwhelming majority of creditors, and I would say an overwhelming number of creditors. In other words, I am definite that the creditors then and there represented would be around 80 to 90 per cent of the creditors; and I am also satisfied there was a majority in number present, too. I have here the assistant vice-president of the Bank of America who may be able to enlighten us as to that if that becomes necessary. At that particular time it was the unanimous opinion of all the creditors there and then assembled—and I want to say that some of the men who were present were not only creditors but experienced business men and experienced oil men. For instance, we had a representative there of the Union Oil Company; we had a representative of the O. C. Fields Gasoline Company; we had a representative there of Oil Well Supply Company; we had a representative of the Republic Supply Company; we had representatives of the Bank of America, and other men—yes; representatives of the Taft Well Drilling Company, and other representatives of that type, and they unanimously were in favor of the immediate liquidation, immediate sale of the property in this receivership so that it be converted into cash and dividends be paid to the creditors.

"We are not interested in speculation; we are not interested in potential profits. I suppose any buyer who makes a bid figures that, but we can't go on indefinitely. We have had more than a reasonable opportunity for this thing to work itself out in the natural course of events, and surely the time has come when this receivership should be liquidated.

"Your Honor will further recall that that meeting appointed a committee consisting of Clarence Hanson, attorney for the Bank of America; myself, as attorney for the Oil Well Supply Company, and Adolph Ramish, representing himself; a committee of creditors called upon Your Honor shortly after July 20, 1938, and conveyed to Your Honor that it was the concensus of opinion of the creditors of this estate that the assets be liquidated and sold as soon as possible, and requested Your Honor to direct and instruct the Receiver accordingly. Pursuant to that the Receiver did get busy, advertised it and a sale as been effected, and unless there is a higher and better bidder for cash today, we recommend that the sale be confirmed.

"We do not feel that the protest is in order. If there are any higher bids, let them come forward, let them produce higher bidders. But merely because they may say there is some future or potential possibility, I do not think it should enter into the case" [R. pp. 163-166].

* * * * * * * * *

"The Court: Why have not these stockholders who now appear to oppose the liquidation, after all these years from 1931—why haven't they gathered together some good buyer who would raise this price

if it is so valuable; I will say that I have determined not to carry on this receivership any longer. It has been here too long. I would not do it" [R. p. 166].

"Mr. Wilson: May we offer testimony, Your Honor, as to the value of the property of the Pentland Lease?

"The Court: If you wish to make a point of it I will allow you to make your offer and have an exception to it. But it is not going to change my mind at the present time because these things have been advertised; we have had meetings and hearings; we have had reports of the Receiver, and everybody has had a chance to tell us anything that there was to be told, and it was finally, after carrying on and carrying on a long time, determined this Receiver cannot maintain that management profitably. To be sure, there is a little profit shown but I will venture to say he will tell you that he has not charged a cent of depreciation against it. And where are you?

"No. 2: There is no Receiver who, for a great length of time, can properly operate an oil producing property for the reason that, as the years go by, development is needed to keep up the profit and quantity. No creditor nor group of creditors would come in here and attempt to prove before the court that the borrowing of $100,000 to put down an oil well was profitable; neither would the court order it. So the natural progress is that they depreciate and depreciate, and you have not only a sample of it in this case—striking in this case—but in other cases" [R. p. 167].

* * * * * * * * *

"Mr. Dechter: I would like to call your attention to the fact that the record shows that Your Honor ordered this sale to be made at public auction at Bakersfield, Kern County, the county in which the property is located, that in the order thus made, in the notice to creditors, notice to the public and the advertisements, it was definitely stipulated that this court would accept a bid of $75,000 if no better bid was received. No objection was made to that procedure being taken. I think the motion should have been made before the Receiver had gone to the expense of a sale advertisement and before the court had made the order. A stockholder at that time could have asked for an order limiting the sale to a certain amount. It seems to me that the protest and motion to vacate the sale comes too late at the present time" [R. p. 168].

It should be noted that neither in the protest, statement of counsel presenting the same, nor in this appeal is there any claim or suggestion of any irregularity in the holding of the sale. Nor is there any claim or suggestion of any misrepresentation, fraud, bad faith, or any circumstance which prevented the sale from being fair and open and productive of the highest bids obtainable. The sale was a public one, and conducted as a public auction, and was noticed and conducted in strict conformity with the court's previous order. Neither the protestant F. G. White, appellant herein, nor anyone else made a higher bid than $48,500.00 for the Pentland Lease, with respect to which

appellant makes his main contention. Furthermore, as hereinbefore pointed out, neither F. G. White nor his counsel has at any time suggested that any higher bid could be secured.

We thus have a situation, at the time of the hearing for confirmation, of a receivership which had existed for over eight years; where a large sum in claims of general creditors still remained unpaid; wherein the court had previously made its order after notice to F. G. White, the appellant herein, for the sale of the leases for a sum not less than $75,000.00; where no objection had been made by said F. G. White, although he was fully advised that the petition sought an order for the sale of the properties for $75,000.00; where sale was had at public auction to the highest bidder in strict conformity with the orders of the court, and where at the time of the hearing for confirmation said F. G. White for the first time filed his protest contending in effect that the receivership should be further continued and that money should be borrowed for drilling operations. The testimony offered was merely that of one man's opinion. There was absolutely no suggestion and has been none of any irregularity, fraud, misrepresentation, or bad faith. No contention has been made that any higher or better bid could be secured for the properties.

The sole question is whether under these circumstances there was any error in the court's refusal to hear the offered testimony and in confirming the sale.

ARGUMENT.

I.

The Sale of the Assets Was Not for a Grossly Inadequate Consideration, and the Circumstances Were Not Such That the Sale Should Be set Aside.

Under the first point in appellant's brief it is contended in effect that the record shows that the sale was for a grossly inadequate consideration and that therefore the sale should be set aside. This point is based on appellant's contention that because the offer of proof was refused it must be considered as established that the Pentland Lease had a value of $2,000,000.00.

We have no quarrel with the authorities stating the general rule to the effect that a sale may be set aside where the price is so grossly inadequate as to shock the conscience of the court, and as most of the cases say, so gross as to raise a presumption of fraud, unfairness, or mistake. However, the record here does not show any such gross inadequacy of price. The fact is that the evidence offered by F. G. White was not admitted by the court, and therefore such evidence is not in the record. If the court erred in refusing to admit the testimony, the error claimed should be of the court's refusal to admit the testimony, rather than a claim that the record shows that it was established that the price was grossly inadequate.

Appellant refers to certain language from the case of *Griffith v. Venzinger* (Md.), 125 A. 512. That case was tried by a jury, and the lower court refused to permit certain offered testimony. On appeal the upper court was considering the propriety of the rulings of the lower court on these matters of evidence. The upper court held that the matters offered to be proved were material and should have been allowed for the consideration of the jury. It is

true that the court used the language quoted in appellant's brief. However, it is also true that in 125 A., at page 519, the court said:

> "Such facts had not, it is true, any conclusive force, but they did have some weight, and the caveators were entitled to have them considered by the jury."

In the case of *Norfolk etc. Railroad Co. v. Fort Dearborn Co.,* 280 Fed. 264, also cited in appellant's brief, objections were sustained to certain questions in an action for damages for the conversion of personal property. A verdict was directed based on certain stipulated facts. On appeal it was held that the case had been tried on an erroneous theory of the measure of damages applicable, and that the appellant was entitled to another day in court, and that the objections had been improperly sustained.

It is quite clear that the authorities cited in appellant's brief do not sustain the rule contended for by appellant, namely, that because the offered evidence is refused that therefore the facts intended to be testified to must be deemed established. Obviously, testimony which is offered and refused could have no greater effect than the testimony would have if admitted. All that the cases cited by appellant hold is that, *for the purpose of determining whether or not the ruling of the lower court in excluding evidence was proper,* it must be assumed that the witness would give the testimony offered. In other words, in order for a determination to be made as to whether certain offered testimony is relevant or material, it is necessary to assume that the witness, if permitted to do so, would give the expected testimony. The testimony itself might have little weight, and certainly might not be conclusive.

The fact is that the testimony offered in this case was such as to amount only to the speculative opinion of the

witness—not only on the question of whether there were deeper sands under the Pentland Lease and as to the reserve value of that lease, but also on the question of whether the use of a large sum of money to deepen existing wells would result in future profits [R. p. 169].

On the other hand, the court had before it other circumstances which constituted much better evidence as to the value of the property. We refer to the fact that a sale, after full notice and publication, had been held at public auction where open and competitive bidding, free from any circumstances of unfairness or fraud, could give the best indications as to the value of the property and what it could be expected to bring at sale.

In *Keyser v. Federal Loan Bank* (1937) (Va.), 193 S. E. 489, the court had under consideration the matter of a sale in a mortgage foreclosure case ordered to be made by certain commissioners. The property was struck off to the highest bidder, and the sale came on for confirmation by the lower court. It was claimed that the bid at the sale was grossly inadequate. In the course of its opinion the upper court quoted from *R. C. L.*, Vol. 16, Sec. 7, p. 95, as follows (193 S. E. 491):

> "A judicial sale regularly made in the manner prescribed by law, upon due notice, and without fraud, unfairness, surprise, or mistake, will not generally be set aside or refused confirmation on account of mere inadequacy of price, however great, unless the inadequacy is so gross as to shock the conscience and raise a presumption of fraud, unfairness, or mistake. . . . And a sale conducted with fairness and regularity should not be set aside for gross inadequacy of price upon conflicting evidence as to whether it sold at or above the fair market value, even though an advance bid is subsequently made of one-fourth over the price at which the property was knocked down."

Continuing, the court said in 193 S. E. at 491:

> "There has been no suggestion in the case at bar that any fraud, mistake, or unfair dealing has taken place with reference to the sale. The sole objection to the confirmation is that the bid of the appellant is so grossly inadequate that it shocks the conscience of the court. Where the sale is tainted with fraud, mistake, or misconduct, and has worked an injustice to the party complaining, the controlling rule in determining whether the sale should be set aside is different from the rule to be applied where none of these elements exists, and the sole reliance for objection to confirmation is inadequacy of price, as is the case here."

The court then sets forth language quoted in *Benet v. Ford* (Va.), 74 S. E. 394, 397, as follows (193 S. E. at 491):

> "The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of undervalue, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results."

We suggest that in this case, where there was no claim of any irregularity, unfairness, or fraud, and where a sale was had at public auction, giving full opportunity for open and competitive bidding, that the results of that auction constitute far better evidence of the value of the leases than the speculative opinion evidence offered by appellant—and especially where it clearly appears that protestant was not claiming that any higher price could be obtained at any sale but, on the contrary, was seeking a continuation of the receivership.

II.

Where Order of Sale Fixed a Minimum Price and Was Made After Notice to and Without Objection from F. G. White, There Was No Error in Court's Refusal to Hear or Consider Testimony Offered in Support of Protest to Confirmation, Where Protest Was Not on the Ground of Irregularity in Sale or Noncompliance With Order of Sale, but Was in Reality a Plea That the Receivership Be Continued.

Under the second point in appellant's brief, it is contended in effect that the court failed and refused to exercise its discretion, and that appellant was denied his legal rights to require the court to entertain the question on its merits.

We think the fallacy in appellant's argument rests in appellant's assumption that in order for the court to exercise its discretion the court should have admitted and considered the testimony offered. In other words, appellant in effect considers that the only place for the operation of the court's discretion was after hearing the evidence offered.

We suggest that there was another point in the proceedings at which the court could and did very properly exercise its discretion. In other words, we think the court had the discretionary right, under the circumstances of this case, to refuse to consider the protest at all.

At the risk of being considered repetitious, we feel that we must again call attention to the fact that, prior to the hearing for confirmation of sale, the court had made an order of sale after full notice to F. G. White and without any objection from him. Before the order was made, F. G.

White was fully advised that it was contemplated that a sale would be ordered for a minimum price of $75,000.00. He did not object to the proposed order, and in the absence of such objection the court ordered the sale to be held at public auction on December 10. The sale was so held, and aggregate bids in excess of $100,000.00 were received. Having failed to object to the proposed order of sale or to the minimum price of $75,000.00 therein provided, we suggest that, under all the circumstances of this case, the court had full discretion to refuse to consider a protest and objection first made at the hearing for confirmation, where the protest and objection was not based on any claimed irregularity in the sale or noncompliance with the order, and especially where the protestant did not claim that any higher or better bid could be secured.

We of course realize that there may be circumstances of unfairness or fraud or collusion by which open and competitive bidding at a sale might result in a lower bid than that justified by the real value of the property. Under such circumstances the court might very properly consider a protest. But no such circumstances exist in this case.

It is quite obvious from a reading of the written protest, and from the statements of counsel in presenting the same, and from the testimony offered, that what F. G. White was really trying to do at the hearing for confirmation was to oppose a liquidation of the receivership estate and to advocate a continuation. If he had any good reason to suggest to the court why the assets should not be sold, or why the minimum price of $75,000.00 was not a proper minimum price to be set forth in the order of sale, he should have appeared in court and stated his objections to the making of the order of sale. Having failed to do so,

with no reason shown for his failure, the court was entirely within its discretionary rights in refusing to consider his later protest.

The very purpose of giving notice to the creditors and stockholders of the contemplated order for sale was to permit them to advise the court as to the matter. To permit persons to later come in, as F. G. White attempted to do here, would be to render meaningless the procedure here followed by the court in giving an opportunity for any person objecting to liquidation to be heard.

In *Clark on Receivers* (2d Ed.), Vol. 1, p. 699, the following is stated (italics ours):

> "The purpose of the law is that the sale should be final and to insure this, it is essential that no sale be set aside for trivial reasons, *or on account of matters which ought to have been attended to by the complaining party prior thereto.*"

See, also:

> *Pewabic Mining Company v. Mason,* 145 U. S. 349, at 356.

In 35 *C. J.,* at p. 46, the following is stated:

> "Where a party knows of any fact that might constitute an objection to the legality of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

Conclusion.

The court, after full notice and hearing, determined that the assets of this eight-year-old receivership should be liquidated and ordered a sale. No objection was made by F. G. White, the appellant here, although he had notice and full opportunity to be heard.

A sale at public auction was conducted in full conformity with the order of court and bids in excess of the minimum price set were secured. The nature of the protest sought to be made at the time of hearing for confirmation was such that the court in the exercise of its discretion was fully justified in refusing to hear the testimony offered thereon. The court was not obliged at such late date and under all the circumstances here present to reconsider its decision that the assets should be sold. The court was not obliged at such late date and under all the circumstances here to consider the suggestion of F. G. White that the receivership should be continued. The testimony offered was not such as would have led to any other conclusion by the court than that the sales should be confirmed.

We respectfully submit that the order confirming the sales should be affirmed.

Bradner & Weil,

By Jerold E. Weil,

Attorneys for Appellee B. J. Bradner, as Receiver for Lake View Oil and Refining Company,

Joseph J. Rifkind,

Attorney for Appellee Oil Well Supply Company, a Corporation.

No. 9194

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
ADRIEN BLANQUIE, doing business as CITY OF PARIS DYEING & CLEANING WORKS,

Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of ADRIEN BLANQUIE, doing business as CITY OF PARIS DYEING & CLEANING WORKS,

Appellant,

vs.

M. DUCASSE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

FILED

SEP 5 - 1939

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Southern Division of the United States District Court Northern District of California.

No. 30513 L

In Bankruptcy.

In the Matter of

ADRIEN BLANQUIE, doing business as CITY OF PARIS DYEING & CLEANING WORKS,

Bankrupt.

ORDER OF ADJUDICATION

At San Francisco, in said District, on the 29th day of July, 1938, before the said Court in Bankruptcy, the petition of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Burton J. Wyman one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Adrien Blanquie, etc. shall attend before said referee on the 8th day of August, 1938, at his office in San Francisco, California, at 10

o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder", a newspaper published in the county of San Francisco, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated July 29, 1938.

MICHAEL J. ROCHE,
District Judge. [1*]

[Indorsed]: Filed Jul 29, 1938, 3:11 P. M. Walter B. Maling, Clerk.

I, Walter B. Maling, Clerk of said District Court, do hereby certify the foregoing to be a full, true, and correct copy of the Order for Adjudication, Reference, etc., in the Matter of Adrien Blanquie, etc. Bankrupt No. 30513 L in Bankruptcy, now remaining on file and of record in my office.

Attest my hand and seal of said District Court, this 18th day of May, 1939.

WALTER B. MALING,
Clerk.

By..
Deputy Clerk.

[Endorsed]: Filed July 29, 1938.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

[Title of District Court and Cause.]

PETITION TO RECLAIM PROPERTY SOLD UNDER CONDITIONAL SALES CONTRACT

To The District Court of the United States for the Northern District of California:

"The petition of M. Ducasse, doing business as West Coast Laundry Machinery Co., respectfully shows to this court:

I.

"That he is engaged in the business of selling laundry machinery at San Francisco, California.

II.

"That heretofore, on or about July 29, 1938, a voluntary petition in bankruptcy was filed in this court by said bankrupt praying that said bankrupt be adjudged a bankrupt; that on July 30, 1938, John O. England, Esq., was duly appointed Receiver of all the assets and effects of said alleged bankrupt and duly qualified and is now acting as such Receiver.

III.

"That on July 30, 1938, an order of adjudication in bankruptcy herein was entered.

IV.

"That on the 29th day of July, 1937, said bankrupt entered into a conditional contract of sale at the City and County of San Francisco, State of California, with said M. Ducasse, doing business

as West Coast Laundry Machinery Co., wherein and whereby certain machinery and equipment was sold to said bankrupt, the title to said machinery and equipment by the terms of said conditional contract of sale, remaining in said seller, M. Ducasse, until the full purchase price thereof was paid; that annexed hereto and marked Exhibit 'A', and made a part of this petition, [2] is a copy of said conditional contract of sale, together with a list of all the machinery and equipment embraced in the terms of said conditional contract of sale.

V.

"That the total amount of the purchase price of said machinery and materials, together with the cost of installing the same, was $8724.94; that there has been paid on account of said sum the sum of $6451.11; that there is a balance due and owing thereon in the sum of $2273.83.

VI.

"That said M. Ducasse has demanded of said bankrupt and of said Receiver the payment of said balance of $2273.83, or the return of said machinery and materials, but the said bankrupt and the said Receiver have refused to make said payment or return the said machinery and materials.

VII.

"That said petitioner alleges upon information and belief that said machinery and materials are now in the possession of said Receiver.

"Wherefore, Petitioner prays for an order directing the said Receiver to forthwith deliver to petitioner the said machinery and materials in his possession covered by the said conditional contract of sale.

"Dated: August ......, 1938.

M. DUCASSE,
Petitioner.

STANLEY JACKSON
WERNER OLDS
BERTRAND A. BLEY
Attorneys for Petitioner.

'EXHIBIT A'

"CONDITIONAL CONTRACT OF SALE

"This Contract, entered into in duplicate this 29th day of July, 1937, by and between West Coast Laundry Machinery Co. of San Francisco, California (Seller) and City of Paris Cleaning Works (Purchaser) of San Francisco, (City) Calif. (State) [3]

"Witnesseth, Seller agrees to sell, and Purchaser agrees to buy the following described chattel, delivery and acceptance of which in good condition is hereby acknowledged by Purchaser, to-wit:

"Machinery and materials furnished and materials used in connection with installation of same as per attached list. $8724.94

"Buyer to keep the above machinery and equipment insured against loss by fire loss, if any, payable to seller as their interest may

appear. Buyer not to remove above machinery and equipment until same is fully paid for from their plant at the above address without the consent of seller.

for the following payments in lawful money of the United States: $6395.66 upon the signing of this contract, receipt of which is hereby acknowledged, and the further sum of $2398.58 payable as follows:

six payments of $50. per month, then 17 payments of $75.00 per month and one payment of $823.58

payable at office of Seller or of assignee of Seller. As long as purchaser's obligations under this contract are not in default, the unpaid balance of purchase price hereunder shall bear interest from date hereof at the rate of 7 per cent per annum.

"It is hereby stipulated and agreed by and between Seller and Purchaser that the following are the conditions under which said chattel is to be sold and purchased:

"1. Title and ownership of said chattel shall remain in Seller, his successors or assigns until all sums which may become due or owing under any clause of this contract shall have been fully paid in cash and thereupon the title and ownership shall pass to Purchaser.

"2. Should Purchaser fail to make any monthly payment above specified when the same is due, or fail to do anything else required hereunder, then

the entire unpaid balance of purchaser price shall at Seller's option, become immediately due and payable and shall bear interest thereafter at the highest lawful rate, and Purchaser agrees to make full payment of such balance, or to return said chattel together with any things added thereto, to Seller on demand and without legal proces. If Seller repossesses said chattel, then Seller may retain all payments previously made as compensation for use of said chattel, and Seller may, at his option, sell said chattel at public or private sale, with or without notice and credit the net proceeds, after expenses, on the amounts unpaid hereunder. If the net proceeds of such sale are insufficient to cover the amount unpaid hereunder, Purchaser agrees to pay any deficiency on demand.

"3. Purchaser agrees to pay all costs of collecting any amount or enforcing any of Seller's rights under this contract, including, [4] without limiting the generality of the foregoing, a reasonable attorney's fee, if this contract is placed in the hands of an attorney by Seller, no matter whether suit is brought or not, and also including the cost to Seller of the time and services of any of his employees in making collection.

"4. Purchaser agrees to pay promptly when due all licenses, taxes and assessments which may be levied upon said chattel and to keep the same at all times free and clear of liens and encumbrances.

"5. Purchaser agrees to insure said chattel against loss by fire in favor of Seller, his succes-

sors or assigns; to take good care of said chattel, and not to remove the same from the premises described below, or to make any structural change in or addition to said chattel without first obtaining consent in writing from Seller, or his successors or assigns. Damage to or destruction of said chattel, however caused, shall not relieve Purchaser of liability for the full price thereof, or of any of the liability hereunder, said chattel shall not become part of the realty.

"6. It is agreed that no other agreement or guaranty, oral or written, express or implied, shall limit or qualify the terms of this contract, and that no warranty of said chattel has been made unless herein expressed. This agreement shall not be binding on Seller until his acceptance is signed hereon.

"7. Purchaser agrees that Seller may at any time assign this agreement or any right thereunder, and that all terms hereinabove set forth for Seller's benefit shall inure to the benefit and operate in favor of his successors and assigns. Purchaser hereby waives as against such successors and assigns all right of recoupment, set-off and counterclaim, which Purchaser has, or ever might have, against Seller, and Purchaser further agrees that Seller's successors or assigns shall be under no responsibility or obligation for the performance by Seller of any term or condition hereof.

"8. Time is of the essence of this agreement and every part thereof.

"9. All words herein shall be deemed to be of the number and gender properly applicable to the Purchaser or Purchasers.

"Above Property To Be Located at 20th & Florida Street (Street and No.) San Francisco, (City) Calif. (State)

["Signed] CITY OF PARIS DRY CLEANING WORKS,
(Purchaser)
"By A. BLANQUIE,
Title Owner

"Accepted July 29th, 1937
"WEST COAST LAUNDRY MACHINERY CO. (Seller)
"By M. DUCASSE,
Title Owner
"Witness O. M. GRIMM." [5]

CITY OF PARIS—

Item	Unit	Amount
1—42x96"—2 Pocket, 2 Door Drying Tumbler		2460.00
1—30x54" Dry Cleaning Washer, Overhead Drive, Roller Bearings		540.00
2—36x54" " " " " "	@ 680.00	1360.00
1—Rebuilt 30" Extractor		350.00
1—New Bock Extractor		322.00
1—Dry Room with 8 Curtain Frames		405.00
2—Sugar Pine Tubs	77.25	154.00
1—Lint Catcher		42.50
1—Table for Steam Puffers		17.50
2—Wood Trucks	25.75	51.50
2—Wood Horses	7.50	15.00
10—16x56 Redwood Ironing Boards)		
3—18x56 Pine Spotting Boards)	for	87.50
2—16x56 " " " with Vitrolite Top)		
4—Pipe Coils		175.00

Item	Unit	Amount
1—Medium Steam Puffer with Stand		11.00
1—750 Gallon Tank with Cover & Joists—set up		47.00
1—1000 Gallon Tank with Cover & Joists " "		54.00
1—1 H.P. 3 Phase Motor with Pulley		45.00
1—Radiator		7.00
1—Radiator		4.52
4—4¼x5¼ Steam Traps	9.25	37.00
3—6¼x5¼ " "	15.00	45.00
1—10x6¼ " "		20.75
20 Ft. 17" Galvanized Leader Pipe	1.00	20.00
3—17" " " Elbows	6.50	19.50
Pipe & Return Bends for Coil in Dining Room		7.35
96 ft. 1-11/16" Shafting	.50	48.00
15—1-11/16"—18 to 20 Drop Hangers	7.75	116.25
10—1-11/16" Collars	.75	7.50
2—1-11/16 Compression Flange Couplings	8.00	16.00
3—1-11/16 Ring Oiling Bearings	5.75	17.25
1—New 4x6" Steel Pulley		3.10
3— " 10x10 " "	5.90	17.70
2— " 11x4" " "	4.20	8.40
2— " 14x4" " "	5.20	10.40
1— " 16x8" " "		8.25
1— " 16x12" " "		10.50
1— " 26x5" " "	15.90	31.80
2—Used 10x10 " "	3.00	6.00
1— " 20x5" " "		5.00
1—New 6x12" Wood "		5.00
1—Used 36x4" " "		6.00
Forwarded		$6615.77

Item	Unit	Amount
Brought Forward		6615.77
40 ft. 1½" Leather Belting		12.95
160 " 2" " "		69.15
62 " 3" " "		40.20
87 " 4" " "		75.15
3 Boxes Belt Hooks		3.00
3 Brass Cable Supports	@2.50	7.50
78 Ft. 3/16" Galvanized Wire Cable		3.12
2 Pr. 6" Extra Heavy Hinges for Ironing Boards		.70
1—5" I Beam 50" Long		2.50

1—3/8x2½″ Angle—45″ long		1.25
31—½″ Globe Valves		49.60
2—¾″ " "	2.20	4.40
9—1″ " "	2.80	25.20
4—1½″ " "	5.50	22.00
1—2″ " "		8.75
8—½″ Check "	1.60	12.80
3—¾″ " "	1.80	5.40
1—1″ Gate Valve—Quick Opening		2.75
2—1½″ " " " "	5.50	11.00
1—1½″ " " " "		4.50
22—1″ Round Brass Comp. Hose Bibbs	2.00	44.00
5—½″ Noiseless Water Heaters	2.00	10.00
1—¾″ " " "		2.50
2—2″ Steam Cocks	6.00	12.00
2—1″ Improved Ball Cocks	2.90	5.80
2—8″ Copper Balls	1.75	3.50
2—15″ Galvanized Stems	.30	.60
13—¾″ " Floor Flanges	.35	4.55
2—2″ " " "	.80	1.60
5 ft. ⅛″ Black Pipe		.25
30″ ¼″ " "		1.65
480 Ft. ½″ " "		27.95
125 " ¾″ " "		9.10
175 " 1″ " "		17.95
247 " 1½″ " "		40.90
43 " 2″ " "		10.00
256 " ½″ Galv. "		18.90
387 " ¾″ " "		34.60
91 " 1″ " "		11.65
7 " 1¼″ " "		1.25
226 " 1½″ " "		46.80
133 " 2″ " "		37.10
2 " 1″ Brass "		2.00
Forwarded		7322.34
Brought Forward		7322.34
50 ft. Perforated Pipe Strap		1.50
1½# Assorted " "		.25
5# Pipe Cement		2.25

1—½″ Black Y	.15
2—1½″ " "	1.75
9—¼″ Black Elbows	.40
2—⅜″ " "	.15
139—½″ " "	11.80
28—¾″ " "	2.50
35—1″ " "	4.45
23—1½″ " "	6.85
4—2″ " "	1.95
2—¼″ " Street Elbows	.10
3—¼—45° Blk " "	.15
1—½″ 45° " " "	.10
1—2″ 45° " " "	.85
1—1-3 way " " "	.45
2—1½″ 3 way " "	2.10
29—½″ Galv. "	3.40
24—¾″ " "	3.10
21—1″ " "	3.85
28—1½″ " "	12.50
14—2″ " "	9.90
2—¾ 3 way "	.90
2—¾ 45° " "	.40
4—1¼ 45° " "	1.95
1—1½″ 45° " "	.65
1—2 45° " "	1.10
1—1¼″ " Street "	.40
39—½″ Black Tees	4.65
7—¾″ " "	.85
9—1″ " "	1.60
9—1½″ " "	3.65
2—2″ " "	1.35
12—½″ " Reducing Tees	1.80
6—1″ " " "	2.05
2—2″ " " "	1.70
4—¾″ Galv. "	.70
10—1″ " "	2.55
2—1½″ " "	5.25
6—2″ " "	5.60
Forwarded	7429.99

Item	Amount
Brought Forward	7429.99
7—¾″ Galvanized Reducing Tees	2.10
10—1½″ “ “ “	7.35
5—¾″ 4 way “ “ “	2.90
1—1¼″ Black Reducers	.55
2—2″ “ “	1.50
2—1½″ Galvanized “	.85
1—1½″ Black Cross	.70
10—1″ Galvanized Couplins	2.40
6⅛ to ⅜″ close & short Black Nipples	.15
30—¼ 2 to 3½″ Black Nipples	1.15
2—¼x4″ “ “	.10
1—⅜x4″ “ “	.05
55 ½″ Close & Short “ “	1.50
111 ½ 2 to 3½″ “ “	4.20
13 ½x4 “ “	.60
17 ½x4½ & 5 “ “	.90
15 ¾ close & short “ “	.50
5—¾ close & short “ “	.35
12—¾ 2½ to 4 “ “	.60
8 1″ Close & short “ “	.35
1—¾″x6 “ “	.10
14 1 2½ to 4″ “ “	1.00
3—1x6″ “ “	.30
1—1x7″ “ “	.15
2—1x8″ “ “	.35
5—1½ close & short “ “	.35
4—1½ 3 to 4½″ “ “	.45
2—2″ Close & short “ “	.20
2—2 3 to 4½″ “ “	.30
2—2x6″ “ “	.40
4—½ 2 to 3½″ Galv. “	.20
2—½x4″ “	.15
4—¾ close & short Galv. “	.15
8—¾ 2½ to 4 “ “	.50
3—1 Close & short “ “	.20
2—1 2½ to 4 “ “	.15
9—15½ & 6 “ “	1.00
6—1x7 “ “	1.20
13—1¼ & 1½ close “ “	1.10
9—1½ 3 to 4½ “ “ “	1.30
4—2″ 3 to 4½″ “ “	.80
Forwarded	7469.14

Item	Amount
Brought Forward	7469.14
14—½" Black Bushings	.55
11—¾" " "	.60
29—1" " "	1.80
17—1½" " "	1.60
1—2" " "	.15
2—3" " "	.60
2—⅜" Galv. "	.15
2—1" " "	.25
1—1½" " "	.20
8—2" " "	2.35
6—½" & ¾" Black Plugs	.15
2—1" " "	.10
2—2" " "	.25
1—⅛" Com. " Union	.10
17—¼" Ground Joint Black Unions	2.40
43—½" " " " "	10.20
12—¾" " " " "	3.40
6—1" " " " "	2.25
1—1½" " " " "	.75
1—2" " " " "	.95
1—1½" " Galvanized "	.35
2—1½" " " "	2.25
2—2" " " "	2.85
1 Sheet 30 Ga. 30x120" Galv. Sheet Iron	1.50
9 Anchor Bolts	2.25
64 Assorted ⅜ to ⅝" Carriage & Machine Bolts	4.10
96 " ¼ to ⅝" Lag, Cap. & Machine Screws	2.20
8—⅜x2½" Brass Bolts	1.40
34—⅜, ½ & ⅝ Expansion Shields	3.80
5—½ & ⅝ Cast Iron Washers	.60
5½# Assorted Cut " "	.55
6# " Nails	.35
14 Linear ft. 1x4 Pine Lumber	.50
12 " " 2x2 " "	.40
32 " " 2x4 " "	2.10
6½ " " 2x6 " "	.65
37½ " " 2x12 " "	7.50
12 " " 3x6 " "	1.80
42 " " ¼ round Pine Lumber	.75

13 Linear ft. 2 round Maple Lumber	1.30
25 " " 2x4 Ro. Redwood Lumber	1.00
32 " " 3x4 " " "	1.90
Aluminum & Gray Enamel Paint	3.75
Tar & Plaster Paris	.85
Cement & Sand	2.50
1 New 26x5" Steel Pulley	10.50
	7555.69

State of California,
City and County of San Francisco—ss.

M. Ducasse, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing Petition to Reclaim property sold under Conditional Sale Contract; that he has read said Petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters, that he believes it to be true.

M. DUCASSE

Subscribed and Sworn to before me this 19th day of August, 1938.

[Seal] MARK E. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 20, 1938. [6]

[Title of District Court and Cause.]

Wednesday, September 14, 1938.

HEARING ON PETITION IN RECLAMATION (TESTIMONY)

APPEARANCES:

J. M. Connors, Esq., Attorney for Trustee;

A. B. Rothschild, Esq., Attorney for Bankrupt;

Werner Olds, Esq., Attorney for Petitioner in Reclamation;

Albert Picard, Esq., Attorney for Chattel Mortgage Holder. [8]

Mr. Connors: If Your Honor please, in this matter a petition in reclamation was filed, one by the holder of the chattel mortgage, and another by the conditional sales contract vendor. I believe it would be best to proceed with the hearing on the petition in reclamation by the conditional sales contract vendor first.

Mr. Olds: Mr. Connors, I think we can stipulate to most of the facts.

Mr. Connors: We may need the books.

Mr. Olds: I would like to introduce into evidence, if the Court please, conditional sales contract executed by the City of Paris Cleaning and Dyeing Works, the bankrupt in this matter, signed by A. Blanquie, the owner, dated July 29, 1937. Annexed to it is an inventory of the property covered by the conditional sales contract. Is it stipulated that is Mr. Blanquie's signature? Is that correct?

Mr. Connors: Before that is introduced, Mr. Olds, I think some testimony should be taken with reference to the making of a new contract in lieu of the contract dated September 14, 1928.

Mr. Olds: I am making my prima facie case. You can bring that out. That is the last contract entered into.

Mr. Connors: I don't want it introduced as an exhibit if an objection can be made to it.

The Referee: Why not make the objection?

Mr. Connors: Well, I want to examine Mr. Ducasse.

Mr. Olds: He is here to be examined so that can be introduced in evidence.

Mr. Connors: All right.

The Referee: You don't object?

Mr. Connors: I would like the ruling to be deferred until [9] that is connected up with an earlier contract.

M. DUCASSE,

Called for the Petitioner, Sworn.

Mr. Olds: Q. Mr. Ducasse, you are the proprietor of the West Coast Laundry Machinery Company, filing the petition of reclamation herein?

A. Yes.

Q. And the City of Paris Cleaning and Dyeing Works is indebted to you under the contract which has been introduced in evidence? A. Yes.

Q. What is the balance due under that contract?

Mr. Picard: Objected to as calling for a conclusion.

Mr. Olds: Q. Do you know what is due under the contract?

The Witness: A. You mean now?

Q. Do you know what balance is due now under the contract?

A. Between twenty-one and twenty-two hundred dollars.

Mr. Picard: I move that the answer be stricken as not responsive. All his answer is is yes or no.

Mr. Olds: Q. Answer this question: Do you know what the balance is now due you by the City of Paris Cleaning and Dyeing Company?

A. I am not sure exactly, close to $2200.

Mr. Picard: I move that the last part of it go out.

The Referee: It may go out.

Mr. Olds: Have you a ledger sheet showing the balance due?

The Witness: A. Yes.

Q. Will you take it out? I want to see the ledger sheet.

Mr. Olds: All right. I will withdraw Mr. Ducasse at this time and put the bookkeeper on the stand.

(Witness excused). [10]

O. M. GRIMM,

Called for the Petitioner, Sworn.

Mr. Olds: Q. Mr. Grimm, you are the bookkeeper for the West Coast Laundry Machinery Company? A. The office manager.

(Testimony of O. M. Grimm.)

Q. As such do you keep the books of the West Coast Laundry Machinery Company?

A. Yes, sir.

Q. Have you got the ledger sheet there showing the account of the City of Paris Cleaning and Dyeing Works? A. Yes.

Q. Tell me from that then, from that book, of your own knowledge, what is due you from that account?

Mr. Picard: Before that is answered, I would like an opportunity to examine the books.

The Referee: Yes.

Mr. Olds: All right, we will show it to you.

Mr. Olds: Q. Showing you these ledger sheets, Mr. Grimm, I ask you, from these ledger sheets and from your own knowledge, what is the balance due by the City of Paris Cleaning and Dyeing Works at this time?

Mr. Picard: To which I object upon the ground that the ledger sheets themselves are the best evidence of their own contents. It is plainly written and all you have to do is offer it in evidence.

Mr. Olds: I don't want to offer it in evidence. He is the bookkeeper, if the Court please. I am asking from the ledger sheets and from his own knowledge. I will offer them in evidence when I am ready.

Mr. Picard: The objection is that the ledger sheets are the best evidence.

Mr. Olds: The ledger sheets are hearsay and the bookkeeper's [11] evidence is the best evidence.

The Referee: Just the reverse.

(Testimony of O. M. Grimm.)

Mr. Olds: In that case, the law has changed since I studied law.

The Referee: Well, it was the rule when I studied. I think that has been more years ago than when you did.

Mr. Picard: I submit the objection.

The Referee: Sustained.

Mr. Olds: I will introduce the ledger sheets in evidence, if the Court please.

The Referee: Very well. Let me have them;

CLAIMANT'S EXHIBIT NO. 1

[Printer's Note: Figures appearing in parentheses under the heading "Credits" show subtotals in pencil on original exhibit.]

"A"

Claimants No. 1

13/14/38

Gross Amount $8724.94 Date of Contract 9/1928 Terms

Net Amount 8724.94

Trade In

BJW/R

DATE	FOLIO	CHARGES Principal Interest	CREDITS Principal Interest	Balance
1938				
Jan. 1				623.60
Mar. 22	C9		150.90	472.70
" 31	J4		8.69	464.01
May 17	J8		13.22	
			(172.81)	
" 31	"10		16.40	434.39
			(189.21)	
July 31	"20		6.82	427.57
			(196.03)	

Amount of Ins.—

Policy No.—

Ex. Date—

Address—20th & Florida Sts., S. F.

Name—City of Paris Clg. & Dyeing Wks.

(Testimony of O. M. Grimm.)

Sheet No....................................				Account No. Contract # 409
Terms				Name—City of Paris Dry Clg. Wks.
Rating				Address—20th & Florida Sts.
Credit Limit				City

Date	Items	Fo	[obscured]	Balance	Credits	Folio	Items	Date
Dec. 31, ~~1938~~ 1928	Balance			5000.00	200.00	C107	1929	Sept. 11
				4800.00	100.00	"109		Oct. 9
				4700.00				
				4600.00	100.00	"112		Nov. 13
					4600.00		Balance	Dec. 31
Jan. 1, 1930				4600.00	100.00	C116	1930	Jan. 16
				4500.00 4400.00	100.00	"118		Feb. 14
				4300.00	100.00	"126		June 9
					100.00	"130		Aug. 14
					100.00	"132		Sept. 16
				4000.00	100.00	"136		Nov. 6
					(600.00)			
					4000.00		Balance	Dec. 31
Jan. 1, 1931				4000.00	100.00	C149	1931	May 28
					100.00	"152		July 1
					100.00	"154		Aug. 11
				3600.00	100.00	"157		Sept. 17
					100.00	"159		Oct. 17
					100.00	"162		Nov. 18
					100.00	"163		Dec. 15
					3300.00		Balance	Dec. 31

(Testimony of O. M. Grimm.)

Mr. Olds: In that case, the law has changed since I studied law.

The Referee: Well, it was the rule when I studied. I think that has been more years ago than when you did.

Mr. Picard: I submit the objection.

The Referee: Sustained.

Mr. Olds: I will introduce the ledger sheets in evidence, if the Court please.

The Referee: Very well. Let me have them;

CLAIMANT'S EXHIBIT NO. 1

[Printer's Note: Figures appearing in parentheses under the heading "Credits" show subtotals in pencil on original exhibit.]

"A"

Claimants No. 1

13/14/38

Gross Amount $8724.94 Date of Contract 9/1928 Terms

Net Amount 8724.94

Trade In

BJW/R

This exhibit commences at page 21 The portion set forth on this page should follow after the portion set forth on page 23.

DATE	FOLIO	CHARGES Principal	CHARGES Interest	CREDITS Principal	CREDITS Interest	Balance
1938						
Jan. 1						
Mar. 22	C9					
" 31	J4					
May 17	J8			13.22		
				(172.81)		
" 31	"10			16.40		434.39
				(189.21)		
July 31	"20			6.82		427.57
				(196.03)		

Amount of Ins.—

Policy No.—

Ex. Date—

Address—20th & Florida Sts., S. F.

Name—City of Paris Clg. & Dyeing Wks.

(Testimony of O. M. Grimm.)

Sheet No.............................
Terms
Rating
Credit Limit

Account No. Contract # 409
Name—City of Paris Dry Clg. Wks.
Address—20th & Florida Sts.
City

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
Dec. 31, ~~1938~~ 1928	Balance			5000.00	200.00	C107		1929 Sept. 11
				4800.00	100.00	"109		Oct. 9
				4700.00				
				4600.00	100.00	"112		Nov. 13
					4600.00		Balance	Dec. 31
Jan. 1, 1930				4600.00	100.00	C116		1930 Jan. 16
				4500.00				
				4400.00	100.00	"118		Feb. 14
				4300.00	100.00	"126		June 9
					100.00	"130		Aug. 14
					100.00	"132		Sept. 16
				4000.00	100.00	"136		Nov. 6
					(600.00)			
					4000.00		Balance	Dec. 31
Jan. 1, 1931				4000.00	100.00	C149		1931 May 28
					100.00	"152		July 1
					100.00	"154		Aug. 11
				3600.00	100.00	"157		Sept. 17
					100.00	"159		Oct. 17
					100.00	"162		Nov. 18
					100.00	"163		Dec. 15
					3300.00		Balance	Dec. 31

(Testimony of O. M. Grimm.)

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
Jan. 1, 1932				3300.00	100.00	C 2		1932 Jan. 23
				3200 3100	100.00	" 4		Feb. 18
				3000.00	100.00	" 6		Mar. 22
				2900.00	100.00	" 8		Apr. 21
				2800	100.00	"12		June 20
					(500.00)			
				2750.00	50.00	"18		Sept. 20
					(550.00)			
					2750.00		Balance	Dec. 31
Jan. 1, 1933				2750.00	50.00	C 4		1934 Feb. 21
				2700 2650	50.00	" 9		Apr. 20
					50.00	"12		June 6
				2600.00	(150.00)			
(REVERSE SIDE) (Heading) "B Claimant No. 1 13/14/38 BJW R								
				2600.00	25.00	C21		1934 Sept. 19
				2575				
					1525.00	J14-1		" Dec. 31
					(1550.00)			
					1050.00		Balance	Dec. 31

(Testimony of O. M. Grimm.)

Date	Items	Folio	Debits	Balance	Credits	Folio	Items	Date
Jan. 1, 1935				1050.00	50.00	C5		1935 Feb. 16
					1000.00		Balance	Dec. 31
Jan. 1, 1936				1000.00	36.63	C27		1936 Sept. 12
				(963.37)	12.42	J 4 & #10		Aug. 30
					63.69	C33		Oct. 28
					21.75	J 4 & #15		Sept. 30
					19.50	J 4 & #18		Oct. 30
				796.01	50.00	C35		Nov. 14
					(203.99)			
					13.10	J 4 & #20		" 30
				782.91				
					(217.09)			
		Balance down			782.91			
Jan. 1, 1937	Balance			782.91	75.30	C13		1937 Apr. 16
Dec. 31		J19	1525.00		17.10	J17	(Ribbons 1.40)	
				684.29	6.22	J18		June 30
					(98.62)			
				623.60	60.69	C24		July 13
					(159.31)			
			2307.91	623.60	1525.00	J19		Dec. 31
					(1684.31)			
					623.60		Balance	Dec. 31
Jan. 1, 1938				623.60				

(Testimony of O. M. Grimm.)

"C"
Claimant No. 1
13/14/38
BJW
R

Name—City of Paris Clg. & Dye
Address—20th & Florida, S. F.

Account No.........................
Accts. Rec.

Date	Items	Folio	Debits	Date	Items	Folio	Credits
1924							
Sept. 30		447	41.50	Dec. 30	By Cash	C 4	549.00
				1925			
2		448	670.—	Jan. 31	" allowance		170.38
Oct. 1		519	7.88				
1925				1925			
Mar. 30		853	8.00	Apr. 10		C-8	8.00
Jan. 20, 1926	393-B	36	11.00	Feb. 10		C23	11.00
Mar. 27	B-K	16	104.00				
"	"	17	4.50				
"	623B	218	4.75	May 4		C28	113.25
Apr. 29	732"	306	24.75				
May 17	774"	343	1.75	June 11		C30	26.50
Aug. 14	954"	496	13.75	Sept. 10		C36	13.75
Dec. 23	205C	732	100.50	Dec. 31	Balance		100.50

(Testimony of O. M. Grimm.)

Date				Amount	Date		Ref.	Amount
Jan. 1, 1927	Balance			100.50	Jan. 7, 1927		C44	100.50
Feb. 17, 1927		421C	88	2.50	Mar. 11		"48	2.50
Mar. 8		463"	123	102.50	Apr. 7		"50	102.50
June 24		753"	311	16.75	July 11		"56	16.75
Jan. 11, 1928		264D	640	8.75				
" 13		F.G.	541	1.50				
" 18		274D	650	74.60	Feb. 10, 1928		C69A	84.85
Sept. 1		877D	1057	160.00	July 11		C79	1000.00
" 1		917"	1058	3.00	Aug. 10		"86	1000.00
					Sept. 14	Cr. Memo	J18	300.00
" 17		971"	1088	1.75	Sept. 19		"84	500.00
" 18		974"	1091	6.65	29	Cr. Memo	J19	1.50
						29	J19	5000.00
" 21		986"	1102	2.75	Oct. 6		C85	824.94
" 22		988"	1105	1.50	14	Cr. Memo	J23	100.00
" 27		997"	1113	9.50				
" 29		10E	1120	1.50				
" 14		800D	1125	8724.94				
Oct. 1		F.G.	894	2.50	Nov. 19		C88	187.65

(Testimony of O. M. Grimm.)

Mr. Olds: Q. Now, Mr. Grimm, what is the balance due there by the City of Paris Cleaning and Dyeing Works to the West Coast Laundry Machinery Company at this time?

Mr. Picard: I object to that upon the ground that it calls for the conclusion of the witness.

Mr. Olds: It does not.

Mr. Picard: It seeks to contradict the written instrument offered in evidence.

The Referee: The objection may be sustained.

Mr. Olds: Q. Mr. Grimm, do the ledger sheets —you say you want to explain the entry?

The Witness: A. Yes. It will be explained in the balance in the lower——

Q. Will you kindly explain that?

Mr. Picard: I object to that on the ground that it attempts to contradict the written ledger sheets.

The Referee: Sustained.

Mr. Olds. Q. Mr. Grimm, is it not a fact that you have [12] changed certain items on the ledger sheets for income tax purposes and it does not show the exact balance due to you?

The Witness: A. That is correct.

Mr. Picard: Just a minute. I ask that that be stricken out.

The Referee: It may go out.

Mr. Picard: I object on the ground that it seeks to contradict the ledger sheets; it also seeks to show a crime against the United States Government.

Mr. Olds: He has a right to do that for income tax purposes.

(Testimony of O. M. Grimm.)

The Referee: If he does it for income tax purposes, he does it for all purposes. You cannot blow hot and cold.

Mr. Olds: For income tax purposes, he has a right to make the changes as have been made.

The Referee: If he makes them, he will stand by them.

Mr. Olds: Q. I ask you what payments have been made by Mr. Blanquie?

Mr. Picard: I object to that on the ground that the ledger sheets are the best evidence of their own contents, the best evidence of payments made.

The Referee: Objection sustained.

Mr. Olds: Q. Who keeps these books, Mr. Grimm?

The Witness: A. I have an assistant; Mr. Ducasse, and Mr. Smith in the office.

Q. By whom were these entries made on the ledger sheets?

A. Well, I suppose part are mine. Do you want me to explain one book entry, how that was?

Q. Yes?

Mr. Picard: I object to anything except answers to exact [13] questions.

The Referee: Make an answer to that question: Who makes the entries?

Mr. Olds: Q. Who makes the entries?

The Witness: A. My assistant, Mr. Smith and Mr. Ducasse.

Q. Under your direction and control?

(Testimony of O. M. Grimm.)

A. Under my direction and control.

Q. Mr. Ducasse is the proprietor of the West Coast Laundry Machinery Company?

A. Yes.

Q. I show you a ledger sheet. Kindly explain the entries on it.

Mr. Picard: I object. It needs no explanation. It is all plain English and they speak for themselves, nothing ambiguous or requiring an explanation.

The Referee: Objection sustained.

Mr. Olds: If the Court please, I would like to continue the matter. I would like to produce the bookkeeper and Mr. Ducasse.

The Referee: What are you going to prove by the bookkeeper?

Mr. Olds: I am going to prove that the correct balance as shown by the ledger sheets is the sum referred to in the petition in reclamation, $1,900.

The Referee: I won't grant the continuance if that is what you are going to prove. The books are the best evidence.

Mr. Olds: I want to assure Your Honor that the books are not the best evidence. We have a right to explain the entries in the books.

The Referee: You have not a right to explain entries that are in a book unless they are ambiguous.

Mr. Olds: I can show they are ambiguous, if the Court please. [14] I can also show why the entries were made.

(Testimony of O. M. Grimm.)

The Referee: You told me they were made for income tax purposes. They are going to stand for all purposes.

Mr. Olds: I would like the opportunity, if the Court please, to explain these ledger sheets and I would like to show Your Honor that the books of account are not the best evidence, that they are merely the exception to the hearsay rule. If a man knows a thing of his own knowledge that is better evidence than the books.

Mr. Picard: They are written admissions.

Mr. Olds: I ask the continuance to show that.

The Referee: The ruling will stand. You are going to proceed today on it.

Mr. Olds: All right. I will excuse you.

(Witness excused).

ADRIEN BLANQUIE,

Called for the Petitioner, Sworn.

Mr. Olds: Q. Mr. Blanquie, you are one of the owners of the City of Paris Cleaning and Dyeing Works, are you not? A. Yes.

Q. And you purchased certain machinery from the West Coast Laundry Machinery Company, did you not? A. Yes, sir.

Q. You paid a certain amount on account, did you not? A. Yes.

Q. When did you make the last payment to them, do you know? A. I don't remember.

(Testimony of Adrien Blanquie.)

Q. You don't remember?

A. No, not when the last payment was made.

Q. Do you know how much the balance is that you owe them now under the contract introduced in evidence? [15]

A. I don't know the exact balance. I know just about.

Q. About how much?

Mr. Picard: I object to the witness's guess. He has kept books. Those matters are supposed to be in books and they can produce those if they can find them.

Mr. Olds: Q. How much do you owe Mr. Ducasse?

Mr. Picard: Objected to on the ground that it calls for the conclusion of the witness after the witness states he does not know.

The Referee: The objection is sustained.

Mr. Olds: If the Court please, I am going to ask a continuance of this case.

The Referee: I put this over specially for you today so you could be here for today.

Mr. Olds: I would like to convince you of the exact balance and that we are not estopped by this ledger to explain entries in the ledger.

The Referee: You are not going to explain by telling me you changed them for income tax purposes.

Mr. Olds: What do the books of Mr. Blanquie show?

(Testimony of Adrien Blanquie.)

Mr. Picard: Everything is removed since 1932, so the ledgers and the pages are out. Everything is removed.

Mr. Olds: I would like a reasonable continuance to argue this matter.

The Referee: It won't do any good.

Mr. Olds: I would like to prove the balance due is the sum of $2200.

The Referee: I won't do it. If you have the books here, you will prove it by your own books. Your statement that they were changed for income tax purposes won't help one bit. They [16] are going to stand for all purposes.

Mr. Olds: If the Court please, they have a right to charge off.

The Referee: Yes, and when they charge them off they are charged off forever.

Mr. Olds: No, when it comes back——

The Referee: It is in this Court. I have held it time and again and I am not going to reverse myself.

Mr. Olds: But when it comes back——

The Referee: I don't care. When it is charged off, it is off for all purposes.

Mr. Olds: Unless it is charged again and they are on again.

The Referee: There is too much of this business of robbing Peter to pay Paul around here anyway.

Mr. Olds: I would like the opportunity to present the law to you.

(Testimony of Adrien Blanquie.)

The Referee: There is no more law to be presented. It is going to be decided today.

Mr. Olds: I can hardly go to the office and dig up the law on it today.

The Referee: You should be prepared. I am prepared to rule right now.

Mr. Olds: I am prepared to go ahead. I did not know there was any explanation of the ledger sheets.

The Referee: That is not a good preparation of your case. It is your fault, not mine.

Mr. Olds: I would like to be heard in this matter and I ask for a continuance.

The Referee: It will be denied on your own explanation. If you don't come into Court with your case prepared—— [17]

Mr. Olds: The case is prepared as far as I can prepare it. Your Honor forbids my going into the question of the ledger sheets.

The Referee: Because the ledger sheets speak for themselves.

Mr. Olds: That is the point I would like to argue.

The Referee: It won't do any good to argue something I could see for myself.

Mr. Olds: I would like to argue the law that the ledger sheet is not conclusive evidence.

If Your Honor please, if this were a suit on an account stated, the account would be conclusive, which I think I can prove.

The Referee: With your own explanation made here, that you changed them for income tax purposes, they are going to stand for income tax purposes and they are going to stand on this petition in reclamation and for all other purposes in this.

Mr. Olds: The ruling of the Income Tax Department is that you have a right to charge off and when collected you have a right to charge again.

The Referee: I am not ruling on the Income Tax Rules at all. I am telling you that what the books show is what we are going to stand on. You put the books in yourself and you are not going to impeach your own proof.

Mr. Olds: I am not trying to impeach my own proof. I am trying to show that the books say.

The Referee: Anybody who can read a book can tell that.

Mr. Olds: I don't know what it says.

Mr. Picard: $400 due.

Mr. Olds: It does not say anything of the kind.

The Referee: Whatever it says there, that is what the amount [18] will be.

Mr. Connors: $427.57, July 31, 1938.

Mr. Olds: Will you get off the witness stand, Mr. Blanquie.

(Witness excused).

Mr. Olds: Mr. Grimm, will you take the witness stand?

O. M. GRIMM,

Recalled.

Mr. Olds: Q. When was the last payment made by Mr. Blanquie, the City of Paris Cleaning and Dyeing Works?

Mr. Picard: Objected to as not the best evidence on the ground that the books are the best evidence.

The Referee: Objection sustained.

Mr. Olds: Q. According to the books, when was the last payment made?

Mr. Picard: Objected to on the ground that the books are the best evidence of their contents.

Mr. Olds: I would like to find out myself.

Mr. Picard: Look at them and see.

Mr. Olds: Q. When was the last payment made? The books do not show that.

Mr. Picard: Plainly shows on the books, and the books are the best evidence.

The Referee: That is the ruling.

Mr. Olds: Q. July 31, $6.82?

The Witness: A. July 31, $6.82. That is correct.

Q. When was the last payment made on principal, according to the ledger sheet?

Mr. Picard: Objected to on the ground that the books are the best evidence.

Mr. Olds: I would like the total from it myself.

Mr. Picard: Look at the books and see. [19]

Mr. Olds: I cannot make any sense out of it.

The Referee: I can.

Mr. Picard: We all can except you apparently.

Mr. Olds: I imagine the payment made, as far as I can tell, is interest in July.

(Testimony of O. M. Grimm.)

The Referee: That is for the Court to determine.

Mr. Olds: Q. Mr. Grimm, at that time he is in default under the contract, at that time, is he not?

The Witness: A. Yes.

Mr. Picard: Objected to on the ground that it calls for the conclusion of the witness.

The Referee: The answer may go out. The objection is sustained.

Mr. Olds: That is all.

Mr. Picard: No questions.

Mr. Olds: Have you the card that shows he is in default? I would like Your Honor to permit me instead of showing the balance as shown by the ledger, to show that it is the sum of $2200.

The Referee: You are not going to impeach your own testimony.

Mr. Olds: I am not trying to impeach my own testimony.

The Referee: When the ledger sheet shows $427 and you are trying to show some $2000, I don't know what it is but impeachment.

Mr. Olds: I am trying to show why the ledger was kept that way.

The Referee: It was kept that way for income tax purposes and it is going to be for all purposes.

Mr. Olds: And it shows he was in default under the contract many, many months, and we are entitled to the reclamation of the [20] machinery.

Mr. Connors: If the Court please, the trustee

desires a ruling on the petition in reclamation be deferred in order to expedite the notice to sell machinery and pay the West Coast Laundry Machinery Company the $427.52.

The Referee: What is the value of the property?

Mr. Connors: The equipment has been appraised. This also includes property subject to chattel mortgage.

The Referee: What is the appraisement?

Mr. Connors: I don't know what it shows as a whole.

Mr. Picard: I think about $5000 for everything together.

The Referee: Is there any way by which you can determine?

Mr. Olds: I would still like the opportunity to show Your Honor that you are erroneous on the ruling.

The Referee: You can still take it up on review.

Mr. Olds: It would be much easier at this time.

The Referee: Your own statements put you out of Court at this time. I guess you have to take it up on review.

Mr. Olds: That is what I have to do; maybe I can reverse you. I am just as positive as Your Honor that I am right.

The Referee: You will have a chance in the upper court on review.

Mr. Olds: All right.

Mr. Connors: May I ask then that an order be made and entered to the effect that the balance due

on the conditional sales contract is the amount shown on the ledgers kept by the petitioner and that an opportunity be given to the trustee to sell the property?

The Referee: How many days?

Mr. Connors: I suggest two weeks. [21]

Mr. Olds: I would like to state at this time that I offer to prove that there is due to the West Coast Laundry Machinery Company the sum of $2,196.74 and that when this ledger is properly read it will so show.

The Referee: Your offer may be denied on the ground that your offer, if you were able to bring the proof in, would be an impeachment of your own testimony put in at your own request.

Mr. Olds: In other words, Your Honor rules I cannot go behind this ledger sheet?

The Referee: That is exactly what I rule. The amount is fixed as $427.57. The order is that the trustee may have to and including the 28th day of September within which to sell this property and pay the amount to the reclamation petitioner or that the petition in reclamation may be granted.

Mr. Olds: Would that give me an opportunity to review the matter before the property is sold? If the Court please, I have ten days to file a petition for review, have I not?

The Referee: That is something you will have to thresh out with the trustee. The order, so far as I am concerned, is now final.

[Endorsed]: Filed Feb. 14, 1939. [22]

[Title of District Court and Cause.]

"ORDER ON PETITION FOR RECLAMATION AND FIXING AMOUNT DUE PETITIONER

"The verified petition for reclamation under the contract of conditional sale of M. Ducasse, doing business as West Coast Laundry Machinery Co., which said petition was duly filed herein, coming on regularly for hearing on the 14th day of September, 1938, and it appearing and the Court finding that said contract of conditional sale of said petitioner is a valid and subsisting contract of conditional sale, and it further appearing to the Court and the Court finding that there is not due to said M. Ducasse the sum claimed in said petition, to-wit: the sum of $2273.83, or any other sum, save and except the sum of $427.57,

"It Is Hereby Ordered, Adjudged, and Decreed that there is due to the petitioner in reclamation the sum of $427.57, and no more, and

"It Is Further Hereby Ordered, Adjudged, and Decreed that the trustee in bankruptcy herein may have to and including the 28th day of September, 1938, within which to sell the property covered by said petition in reclamation and pay to said petitioner in reclamation said sum of $427.57, and if said trustee fails so to do that said petition in reclamation be granted.

"Dated: September 14, 1938.

"BURTON J. WYMAN,

"Referee in Bankruptcy".

[Endorsed]: Filed Sept. 22, 1938. [26]

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S ORDER

To Burton J. Wyman, Esq., Referee in Bankruptcy:

"Your petitioner respectfully shows:

"That he did heretofore file a petition for reclamation herein under a contract of conditional sales entered into by him with the above named bankrupt; that in the course of the proceedings herein on the 14th day of September, 1938, an order, a copy of which is hereto annexed and marked Exhibit 'A', was made and entered herein.

"That such order was and is erroneous in that it fixes the sum due petitioner under said contract of conditional sale at $427.57 and not at $2273.83, the amount claimed by petitioner.

"That such order herein is contrary to law; that in the course of said proceedings held on said 14th day of September, 1938, petitioner sought to introduce testimony to explain the figures and entries and the import of the figures and entries appearing on the ledger sheets of petitioner introduced in evidence and the circumstances under which said entries were made and the matter to which said entries related, and to show that the said ledger sheets in relation to said conditional sales contract would show by said explanation and testimony that there was due to petitioner the sum of $2273.83 and not the sum of $427.57.

"That said Burton J. Wyman, Referee in Bankruptcy, erroneously refused to allow petitioner to

introduce such or any oral testimony affecting or in any way pertaining to said items appearing in said [27] ledger sheets and for the purpose of showing that the sum of $2273.83, and not the sum of $427.57, was due, owing and unpaid by the bankrupt to petitioner on said conditional contract of sale.

"Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and all the amendments thereto and General Order XXVII.

"Dated: September 23rd, 1938.

"M. DUCASSE,
"Petitioner."

"STANLEY JACKSON
"WERNER OLDS
"BERTRAND A. BLEY
Attorneys for Petitioner."

[Endorsed]: Filed Sept. 23, 1938. [28]

(Here follows Exhibit "A" which is a copy of the order on petition for reclamation and fixing amount due petitioner signed by the Referee). [Page 38 of this printed record.] [29]

District Court of the United States
Northern District of California
Southern Division

At A Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 19th day of April, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Harold Louderback, D. J.

30513-L

In the Matter of
Adrien Blanquie,
In Bankruptcy

As prayed for in the Petitioner's Petition for Review it is ordered that this case be and is hereby re-referred to the Referee in Bankruptcy for further hearing and for determination of the application of M. Ducasse (doing business as West Coast Lumber Co.) for amount due.

United States of America,
Northern District of California—ss.

Certified Copy

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Order of adjudication, filed July 29, 1938; Petition to reclaim property sold under conditional sales contract, filed August 20, 1938; Testimony at hearing on petition in reclamation, filed February 14, 1939; Exhibits "A", "B" and "C", Order of Referee on petition filed September 22, 1938; Petition to review Referee's order, filed September 23, 1938, Order of Judge Louderback re-referring case to Referee entered April 19, 1939 In the Matter of Adrien Blanquie, in Bankruptcy No. 30513-L. now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif. this 24th day of May, A. D. 1939.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH,
Deputy Clerk.

[Title of District Court and Cause.]

ORDER APPOINTING TRUSTEE

In said District on the 22d day of August, 1938 at the hour of two o'clock P. M., before the Honorable Burton J. Wyman, Referee in Bankruptcy, this being the day appointed for the first meeting of creditors of said bankrupt, and due notice having been regularly given thereof, and the majority of the claims of creditors in number and amount having been voted for John O. England as trustee, he was thereupon elected trustee of said bankruptcy estate.

It Is Therefore Ordered, that the appointment of said trustee be, and the same is hereby approved.

Dated: August 23, 1938.

BURTON J. WYMAN,
Referee in Bankruptcy.

I hereby certify that the above and foregoing is a full, true and correct copy of Order now on file and of record in this office.

Dated 5/18/39.

BURTON J. WYMAN,
Referee in Bankruptcy. [31]

[Endorsed]: No. 9194. In the United States Circuit Court of Appeals for the Ninth District. In the Matter of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works, Bankrupt. John O. England, Trustee in Bankruptcy of

the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works, Appellant, vs. M. Ducasse, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed May 26, 1939.

PAUL P. O'BRIEN,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Harold Louderback, Judge of the United States District Court, and to Werner V. Olds, B. A. Bley and S. Jackson, Attorneys for M. Ducasse, Reclamation Petitioner;

You, and each of you, will please take notice that John O. England, Trustee of the estate of the above named bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment herein made and entered in the District Court of the United States, Northern District of California, Southern Division, on the 19th day of April, 1939, in favor of said Reclamation Petitioner and against said Trustee in Bankruptcy, and from the whole of said judgment.

Dated: May 17, 1939.

GRANT H. WREN.

United States of America,
Northern District of California—ss.

Certified Copy

I, Walter B. Maling, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Notice of Appeal, filed May 19, 1939 In the Matter of Adrien Blanquie, Bankrupt, No. 30513-L. now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, Calif. this 16th day of June, A. D., 1939.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH,
Deputy Clerk.

[Endorsed]: Filed May 19, 1939. Walter B. Maling, Clerk.

[Endorsed]: Filed June 26, 1939. Paul P. O'Brien, Clerk.

In The United States Circuit Court of Appeals for The Ninth District

No. 9194

In the Matter of

ADRIEN BLANQUIE, doing business as CITY OF PARIS DYEING & CLEANING WORKS,

Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of ADRIEN BLANQUIE, doing business as CITY OF PARIS DYEING & CLEANING WORKS,

Appellant.

vs.

M. DUCASSE,

Appellee.

STATEMENT OF POINT UPON WHICH APPELLANT INTENDS TO RELY UPON APPEAL

To Paul P. O'Brien, Clerk of the Above Entitled Court:

In compliance with Rule XIX, Subdivision VI of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, effective December 19, 1938, appellant files this Statement of Point upon which he intends to rely on the appeal, to-wit: District Judge Harold Louderback, by his Order

dated April 19, 1939, re-referring the matter to Bankruptcy Referee Wyman, erred in failing to affirm the ruling of Bankruptcy Referee refusing to permit the introduction of oral testimony by appellee for the purpose of contradicting his original entries in his book of account.

Appellant specifies the facts in support of the above point as follows:

Appellee petitioned Bankruptcy Referee Wyman to reclaim personal property sold under a Conditional Contract of Sale to the bankrupt, alleging a balance of $2273.83 owing and unpaid. At the hearing of said Reclamation Petition ledger sheets of the appellee were introduced in evidence showing a balance of $427.57 only owing and unpaid. The objections of the appellant Trustee in Bankruptcy to the attempt of the appellee to explain and contradict the entries in his original book of account by oral testimony were sustained by Bankruptcy Referee Wyman. Appellee filed his Petition to Review the ruling of the Referee in Bankruptcy sustaining the objections of the Trustee to the introduction of oral testimony, and District Judge Louderback made and entered an Order re-referring the matter to Bankruptcy Referee Wyman for a further hearing to determine the amount due appellee.

GRANT H. WREN,

Attorney for Appellant Trustee in Bankruptcy.

Receipt of a copy of the above statement is admitted this 11th day of July, 1939.

STANLEY JACKSON
WERNER OLDS
BERTRAND A. BLEY,
Attorneys for Appellee.

[Endorsed]: Filed July 12, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION OF THE POINT UPON WHICH APPELLANT INTENDS TO RELY UPON APPEAL

To Paul P. O'Brien, Clerk of the above entitled Court:

In compliance with Subdivison VI of Rule XIX of this Court effective December 19, 1938, the appellant designates the following portion of the record necessary for consideration of the Point specified upon which he intends to rely upon his appeal, to-wit:

Order Adjudging Adrien Blanquie a Bankrupt;

Petition to Reclaim Property sold under Conditional Sales Contract;

Entire Transcript of Testimony before Bankruptcy Referee Wyman on Petition to Reclaim;

Claimant's Exhibits "A", "B" and "C" introduced in evidence at hearing, consisting of Ledger sheets;

Order of Bankruptcy Referee Wyman on Petition to Reclaim;

Petition to Review Bankruptcy Referee's Order;

Order of District Judge Louderback re-referring Matter to Referee Wyman;

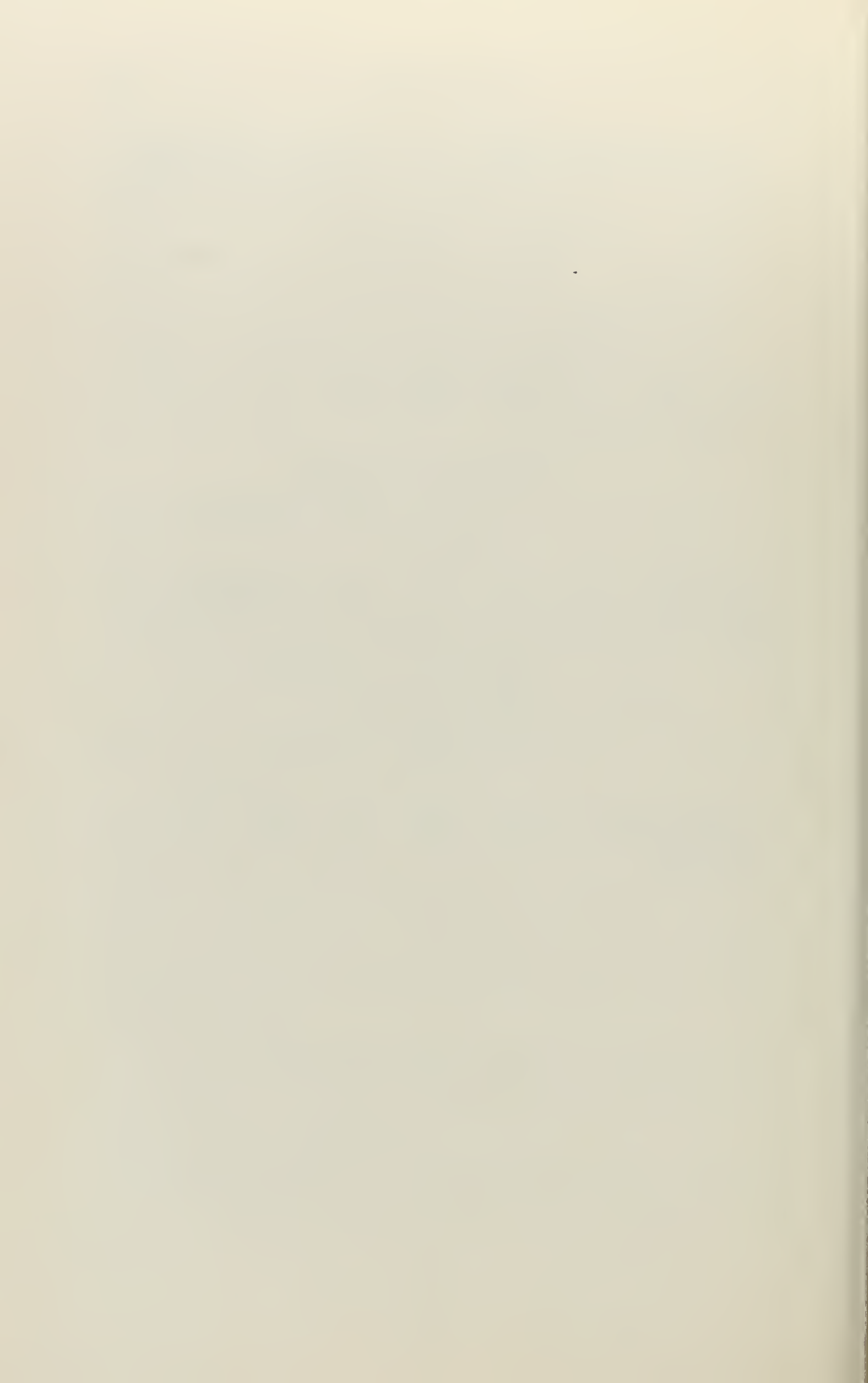
Notice of Appeal.

GRANT H. WREN,
Attorney for Appellant Trustee.

Receipt of a copy of the above Designation of parts of record admitted this 11th day of July 1939.

STANLEY JACKSON
WERNER OLDS
BERTRAM A. BLEY,
Attorneys for Appellee.

[Endorsed]: Filed July 12, 1939. Paul P. O'Brien.



No. 9194

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

5

In the Matter of
ADRIEN BLANQUIE,
doing business as City of Paris Dyeing & Cleaning Works,
Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works,
Appellant,

vs.

M. DUCASSE,
Appellee.

NOTICE OF MOTION TO DISMISS APPEAL.

MOTION TO DISMISS APPEAL.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLEE.

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
209 Post Street, San Francisco,
Attorneys for Appellee.

ROBERT E. HALSING,
209 Post Street, San Francisco,
Of Counsel.

FILED

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No. 9194

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of

ADRIEN BLANQUIE,

doing business as City of Paris Dyeing & Cleaning Works,

Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works,

Appellant,

vs.

M. DUCASSE,

Appellee.

NOTICE OF MOTION TO DISMISS APPEAL.

To John O. England, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works; and to Grant H. Wren, Esq., and James M. Connors, Esq., his attorneys:

You and each of you will please take notice that the above named appellee, M. Ducasse, will move the

above entitled Court to dismiss appellant's appeal herein at the time that said appeal is called for hearing before the above entitled Court or as soon thereafter as counsel can be heard and that said motion will be made and based on all the papers, records and files herein including this notice of motion to dismiss appeal, said motion to dismiss appeal, and statement of facts and points and authorities therein.

Dated, San Francisco,
September 15, 1939.

Stanley Jackson,
Werner Olds,
Bertrand A. Bley,
Attorneys for Appellee.

Robert E. Halsing,
Of Counsel.

No. 9194

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of

ADRIEN BLANQUIE,

doing business as City of Paris Dyeing & Cleaning Works,

Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works,

Appellant,

vs.

M. DUCASSE,

Appellee.

MOTION TO DISMISS APPEAL.

STATEMENT OF FACTS.

M. Ducasse, doing business as West Coast Laundry Machinery Company, filed a petition for reclamation in the above bankruptcy proceedings based on a conditional sales contract entered into between him and the said bankrupt. In the course of the hearing on

said petition, held before Hon. Burton J. Wyman, Referee in Bankruptcy, on September 14, 1938, said M. Ducasse sought to introduce testimony to explain the figures and entries and the import of the figures and entries appearing on the ledger sheets of said M. Ducasse, introduced in evidence, and to explain the circumstances under which said entries were made, and the matters to which said entries related, and to show that the said ledger sheets in relation to said conditional sales contract would show by said explanation and testimony that there was due to said M. Ducasse the sum of $2273.83, and not the sum of $427.57, which said last named figure was the last figure appearing on said ledger sheets.

Said Burton J. Wyman, Referee in Bankruptcy, refused to allow said M. Ducasse to introduce such, or any, oral testimony, affecting, or in any way pertaining to said items appearing in said ledger sheets, and for the purpose of showing that the sum of $2273.83, and not the sum of $427.57 was due, owing and unpaid by said bankrupt to said M. Ducasse on said conditional sales contract.

Burton J. Wyman, said Referee, made his order on September 14, 1938, in said bankruptcy proceedings, ordering, adjudging and decreeing that there was due to said M. Ducasse in reclamation the sum of $427.57, and no more.

Thereafter, and on September 23, 1938, said M. Ducasse filed in said bankruptcy proceedings his petition to review Referee's said order.

Thereafter, the Honorable District Judge Harold Louderback made the following order (Tr. 41):

> "As prayed for in the Petitioner's Petition for Review, it is ordered that this case be, and is hereby re-referred to the Referee in Bankruptcy for further hearing and for determination of the application of M. Ducasse (doing business as West Coast Laundry Machinery Company) for amount due."

The appeal sought to be taken herein is from the above quoted order.

MOTION.

Now comes M. Ducasse, appellee in the above entitled proceedings, and moves that the appeal filed herein, notice of which appeal was filed in the District Court on June 26, 1939, by John O. England, Trustee in Bankruptcy in the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works, be dismissed on the following grounds:

1. That the Court lacks jurisdiction to entertain this appeal for the reason that the order of the District Court from which an appeal is sought to be taken is an interlocutory order made in a controversy arising in proceedings in bankruptcy.

2. That said lack of jurisdiction appears from the statement of points upon which appellant intends to rely upon appeal filed herein, as well as the appellant's statement of case and specification of error contained in brief of appellant on file herein.

3. That the said interlocutory order of the District Court from which an appeal is sought to be taken is not one from which an appeal lies.

Wherefore, appellee M. Ducasse prays that said appeal be dismissed with costs.

Dated, San Francisco,
September 15, 1939.

Stanley Jackson,
Werner Olds,
Bertrand A. Bley,
Attorneys for Appellee.

Robert E. Halsing,
Of Counsel.

No. 9194

IN THE

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Appellant,

vs.

M. DUCASSE,

Appellee.

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

The appeal sought to be taken herein is governed by the provisions of Section 24A of the Bankrupt Law, as amended in 1938, which provides, as follows:

> "Section 24. Jurisdiction of Appellate Courts. a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective juris-

dictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court."

That the order of the District Court from which an appeal is sought to be taken herein, is one made in controversies arising in bankruptcy proceedings and not merely in proceedings in bankruptcy, is clearly made to appear in the decision rendered in *Hewit v. Berlin Machine Works,* 194 U. S. 296.

The order of the District Court Judge made herein is an interlocutory, and not a final, order. *Goodman v. Brenner,* 109 Fed. 481.

Prior to the 1938 amendment to the Bankruptcy Act, appeals were permitted from interlocutory orders in controversies in bankruptcy proceedings only in such cases where appeals were permitted in civil actions generally, under the provisions of the Bankruptcy Act as it stood prior to the 1938 amendments thereto, and there is nothing in the 1938 amendments, particularly as they affect Section 24 (a) and (b) and Section 25 of the Act to show that Congress intended to increase, in controversies, the jurisdiction of the Circuit Court of Appeals. (Attention is called to the scholarly discussion upon the foregoing subject appearing in Collier-Bender Pamphlet Edition, Bankruptcy Act, published in 1938, page 68, et seq.)

Since, therefore, an appeal will lie from an interlocutory order herein only if the appeal generally is allowed from such an interlocutory order, Section 129 of the Judicial Code (28 U. S. C., Paragraph 227) providing as follows, necessarily controls:

> "227. (Judicial Code, Section 129, amended) Appeals in proceedings for injunctions and receivers. Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal.
>
> "In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may also be taken to said court from an interlocutory decree in admiralty determining the rights and liabilities of the par-

> ties: Provided, That the same is taken within fifteen days after the entry of the decree: And provided further, That within twenty days after such entry the appellant shall give notice of the appeal to the appellee or appellees; but the taking of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just. (As amended Apr. 3, 1926, c. 102, 44 Stat. 233.)"

That the interlocutory order of the District Court from which an appeal is herein sought to be taken is not one from which an appeal lies conclusively appears from the decisions rendered in *Pierce v. National Bank of Commerce,* 282 Fed. 100, and *Schumaker v. Security Life and Annuity Co.,* 159 Fed. 112.

It is respectfully submitted that the appeal sought to be taken herein will not lie and that it should be dismissed with costs.

Dated, San Francisco,
September 15, 1939.

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
Of Counsel.

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Appellant,

vs.

M. DUCASSE,

Appellee.

BRIEF FOR APPELLEE.

The following brief is filed without prejudice to the right of appellee to make the foregoing motion to dismiss appeal.

STATEMENT OF CASE.

Appellant's statement of case is substantially correct with the following two exceptions:

1. M. Ducasse at no time attempted to "vary" or "contradict" his own books of account by oral testimony as stated by appellant, but he did attempt to "explain" them.

2. Appellant states that the question involved upon this appeal "relates to the erroneous ruling of the District Court referring the case to the Bankruptcy Referee * * *." (Brief of Appellant, page 3.)

It is submitted that appellant's statement that the ruling is an erroneous one is there prematurely made and is not properly included in the statement of facts.

POINTS AND AUTHORITIES.

I.

BOOKS OF ACCOUNT ARE THE BEST EVIDENCE OF WHAT THEY CONTAIN—BOOKS OF ACCOUNT ARE NOT THE BEST EVIDENCE OF THE TRANSACTION REFLECTED BY SAID BOOKS OF ACCOUNT AND PAROL EVIDENCE TO EXPLAIN BOOKS OF ACCOUNT IS ADMISSIBLE, WHEN THE TRANSACTION IS THE MATTER IN CONTROVERSY.

The first statement hereinabove made under Points and Authorities is the one made by appellant and to prove the correctness of it appellant devotes many pages of his brief and states many authorities. This was entirely unnecessary as appellee freely admits that it correctly states the law, but appellee also insists that that rule of law is entirely inapplicable on this appeal.

The second statement hereinabove made under Points and Authorities is the correct statement of the law involved on this appeal; in other words, the prob-

lem is not how may the contents of books of account or ledger sheets of M. Ducasse, appellee, be proved, but what evidence is admissible to show how much is owed by the bankrupt to appellee under a conditional sales contract.

On the hearing on appellee's petition for reclamation before the Referee in Bankruptcy proof of the amount owing to appellee under said conditional sales contract was sought to be elicited by appellee's attorneys from both M. Ducasse, the proprietor, and O. M. Grimm, office manager, of their own knowledge. (Tr. 17, 18 and 19.) The ledger sheets were introduced in evidence only when the Referee refused to permit said M. Ducasse or said O. M. Grimm to testify from their own knowledge as to the amount due. (Tr. 20.)

On page 5 of his brief appellant cites *Jones Commentaries on Evidence,* Volume 2, page 1421 (2nd Ed.) and quotes the first sentence of Paragraph 767 which reads as follows:

> "Books of Account. Where reference is made in the evidence, and it is sought to introduce evidence of the contents of books of account, such books are ordinarily the best evidence within the meaning of the rule, and parol evidence as to the matter in question is inadmissible against proper objection."

Here again is stated the proposition of law which admittedly is correct. But this one sentence is not all that there is said on the subject of "books of account" the title of the paragraph. The following also appears immediately after the quoted sentence:

"The question in such cases, however, is as to the nature of proof available. If it is impracticable to prove the fact in issue directly, and only the contents of the books as reflecting the fact are available, it appears from the more discriminating authorities that the best evidence rule applies as in all other cases where the attempt is to prove the contents of a writing. But where, on the other hand, the transaction is otherwise directly evidenced or is independently recollected by an available witness, the books are only on the same plane with such other evidence. In such latter cases the best evidence rule does not apply to exclude parol or other direct evidence as secondary to the books, for there is no attempt by such evidence to prove the contents of the books, the contents of the books being simply other evidence to the same point.

"A person having knowledge of the sale of a chattel, and the amount paid or agreed to be paid for it, is a competent witness to the fact, although he may have recorded in his books of account a memorandum of the sale. Indeed, books of account have always been regarded as a species of secondary evidence, admissible in favor of the party keeping them because of the necessities of the case, not because they are the best evidence of the transactions recorded in them. The fact that certain entries have been made has never been held to preclude the testimony of a person having knowledge of the facts, and able to testify to them from memory. * * * Where books are offered in evidence and are available to the parties, oral proof may be given of entries in them * * *."

And Section 768 at page 1425 of the same text contains the following:

> "Limitations and Distinctions. The distinction noted in the preceding section, with regard to the application of the rule to books of account, is to be noted throughout in the application of the rule. Where direct testimony or evidence is available with regard to a fact in issue, and such fact is not required by law to be evidenced by writing or by a particular form of writing, and the fact, as a matter of evidence or of substantive law, is not legally merged in the writing, the mere existence of a writing appertaining to the fact does not make such writing primary evidence thereof. It is only where the parol or other evidence offered is as to the contents of the writing, or, in other words, where the attempt is to prove the fact by proving the contents of the writing other than by producing the original, that the best evidence rules applies. The rule is often imposed by legal intendent, as where the terms of a contract have been reduced to writing and the law conclusively implies that such writing was intended to stand as primary evidence. But in the absence of such a legal intendment, the application of the rule depends upon evidence available and whether the attempt is to prove the fact indirectly by proving the contents of a writing without producing it, or whether it is sought by competent evidence to prove the fact independently of the writing and without regard to its existence."

Starting then with the rule of law stated in the text cited by appellant to the effect that books of account are not the best or only evidence of the transaction

reflected by such books of account, but that one who knows the facts may testify to such facts, we turn to the authorities.

The cases with practical unanimity sustain the proposition advanced by appellee that books of account are not the best or sole evidence of the transaction reflected in them.

The first case to which we will call the Court's attention is that of *Maguire v. Cunningham,* 64 Cal. App. 536, at page 549. The following language was there used by the Court:

> "Entries in books of account are never the best evidence in the sense that they are primary to the testimony of men who have participated in events of which a record has also been made in the books, nor are they primary to the testimony of third parties who have witnessed the occurrence of the events. In truth, upon the basic principles of evidence it is the testimony of the actors in any occurrence, or of those who see their acts or hear their words, which is primary to any record kept in books."

The foregoing language was used by the Court in holding that the objection to oral testimony covering matters appearing in company books was properly overruled.

An important and often cited case on the question here involved is that of *Cowdery v. McChesney,* 124 Cal. 363, at page 365; the Court said:

> "The only way an account can be proved ordinarily, is by establishing by evidence the several

items of the same, and the oral evidence of persons having personal knowledge, of the transactions is the best evidence of the items, unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties have kept a book account of their transactions does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transaction in which the various items of an account accrued is still primary and not secondary evidence of such items. The books themselves are secondary or supplementary evidence."

In the case of *Argue v. Monte Regio Corp.,* 115 Cal. App. 575 at page 577, the Court quoted from *Cowdery v. McChesney,* supra, and re-affirmed the principle that "The oral evidence of persons having personal knowledge of the transactions" is "the best evidence of the items".

In *Bushnell v. Simpson,* 119 Cal. 658, at page 661, the Court made the following exposition:

> "At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence upon a proper showing of the mode in which they had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence."

The Court had no doubt in its mind on the question of law under discussion in rendering its decision in *Schurtz v. Kerkow,* 85 Cal. 277, and at page 279 used the following language:

> "While the books were admissible evidence on the issue of profits they did not exclude other evidence. If the defendant or other witness *knew* any thing about those profits he should have been allowed to tell it."

In *Bailey v. Hoffman,* 99 Cal. App. 347, at page 349, in discussing books of account the Court said:

> "But, it will not be controverted that the parties were entitled to explain the account by the introduction of evidence regarding the circumstances under which it was made and the matter to which it related. (Civ. Code, sec. 1647.)"

From the foregoing citations of text and authorities appellee believes that the following correctly states the law:

Even though a transaction is entered in books of account or ledger sheets if there are persons who of their own knowledge know of the terms and form of the transaction or the amounts paid thereon or due thereunder their testimony as to the terms and form of the transaction and the amounts paid thereon or due thereunder is admissible in evidence and is in fact the best evidence thereof. Where it is sought to prove what books of accounts show, quite naturally the books themselves are the best evidence.

It is respectfully submitted that this appeal involves the former question and not the latter in that

the fact sought to be proved by appellee on the hearing before the Referee in Bankruptcy was: What amount is still owing to him from the bankrupt and not what his books of account or ledger sheets showed the balance to be.

II.

BOOKS AND RECORDS OF APPELLEE ARE ADMISSIONS AGAINST HIS INTEREST.

Under this heading appellant has written some six pages of brief. Appellee is perfectly willing to grant appellant that books and records may be used as admissions against interest of the party keeping the books. Just how this proposition enures to appellant's benefit on this appeal is not readily seen. The most that appellant can gain thereby is that after appellee has been permitted to show the actual amount still owing to him from the bankrupt the appellant would be entitled to introduce in evidence the books of account of appellee and in so far as these books might show a lesser sum due without a proper explanation thereof appellant would be entitled to have the Court decide which amount properly is owed by appellee. In other words, the question involved on this appeal is how may appellee prove the amount owing to him and not what proof has he been able to make to the Court.

III.

DEDUCTION FOR INCOME TAX PURPOSES.

This is the third and final subject discussed in appellant's brief. It is earnestly submitted that at this time no question properly arises as to the correctness or validity of deductions that may have been made by appellee in the keeping of his accounts, that matter is collateral entirely and in no way affects the point in issue. We reiterate the question is one of evidence and not of substantive law. Further, should such deduction be found not justified, the only result can be that the proper constituted authorities may take steps to correct any unjustified deductions but such deductions cannot in any way be used as an estoppel against appellee or in any manner change the amount actually still owed to appellee by the bankrupt in whose shoes the appellant trustee stands.

CONCLUSION.

In conclusion appellee respectfully submits that the ruling of the Referee in Bankruptcy denying appellee the right either to prove the amount still owing to him by the testimony of those who knew the facts, or to explain the ledger sheets, was erroneous; that the order of the District Court Judge re-referring the matter to the Referee for the purpose of permitting appellee to explain his ledger sheets and show the amount actually due was correct.

It is further respectfully submitted that appellant's brief herein contains not one citation or argu-

ment pertinent or relevant to the question involved on this appeal.

Wherefore, appellee prays that the decision of the District Court made and entered on the 19th day of April, 1939, be affirmed with costs to appellee.

Dated, San Francisco,
September 15, 1939.

Respectfully submitted,

STANLEY JACKSON,
WERNER OLDS,
BERTRAND A. BLEY,
Attorneys for Appellee.

ROBERT E. HALSING,
Of Counsel.

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Appellant,

vs.

M. DUCASSE,

Appellee.

APPELLANT'S REPLY TO APPELLEE'S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS APPEAL.

CLOSING BRIEF OF APPELLANT.

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Appellee.

APPELLANT'S REPLY TO APPELLEE'S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS APPEAL.

The above named appellee has moved to dismiss the appeal of the Trustee in Bankruptcy from the Order of the District Court (Tr. 41) upon the ground that the same is an Interlocutory Order made in a controversy arising in proceedings in bankruptcy and is therefore not an Order from which an appeal lies.

The Order of the District Court was made in a controversy arising in a bankruptcy proceeding but this Order has a definite degree of finality and is not of an interlocutory nature in any sense of the word. This Order resulted from the filing of a Petition to review an Order of the Referee in Bankruptcy adjudging the sum of $427.57 as the balance owing the appellee under a Conditional Sale Contract and the Referee's Order fixing the amount due is predicated upon the same amount appearing in the appellee's books of account as owing by the bankrupt to him. The Petition to review the Referee's Order (Tr. 39) specifically states that the Referee's Order is contrary to law for failure of the Referee to allow the appellee to explain entries in his books of account for the purpose of showing a larger amount due. The Order of the District Court referring the matter to the Referee to determine the amount due is a final Order in that the Referee is directed to receive the oral evidence which the appellee heretofore attempted to offer and then determine the amount owing. This Order of the District Court is therefore a final Order concerning the admissibility of oral evidence to explain the books of account of the appellee. Being a final Order and not an Interlocutory Order it is appealable under the provisions of Section 24a of the Bankruptcy Act as amended in 1938. This Order of the District Court therefore reverses the ruling of the Referee in Bankruptcy regarding the admissibility of oral evidence and is a final Order binding on the Bankruptcy Court in case this matter is returned to it for further hearing.

Even, however, if it may be assumed for the purpose of argument that the District Court Order is an Interlocutory Order, nevertheless there is no distinction between Interlocutory and final Orders since the above mentioned Section of the Bankruptcy Act was amended in 1938. The appellee on pages 7 and 8 of his Brief has cited Section 24a as amended and for the purposes of comparison and noting the change in the language of Section 24a prior to its amendment, we submit the following:

> "Jurisdiction of Appellate Courts.—a. The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction *in other cases.*" (Italics ours.)

A comparison of the above quoted Section 24a prior to its amendment in 1938 will disclose a change in the verbal arrangement of the section. Prior to commenting upon the elimination of the above italicized words, "in other cases" we desire to comment upon the proviso at the end of the amended Section 24a, which provides that *any* order, decree or judgment involving less than $500.00 may be appealed only upon allowance by the Appellate Court. This proviso clearly indicates an intention to eliminate any distinction between appeals in "proceedings" and in "controversies". In other words *any* Order involv-

ing an amount in excess of $500.00 is an appealable Order and this Court in the pending matter by its decision rendered on June 3, 1939, (104 Fed. (2d) 760) determined that an amount in excess of $500.00 was involved.

Counsel for the appellee has cited Section 129 of the Judicial Code on page 9 of his Brief in support of his contention that Interlocutory Orders can be appealed if an appeal generally is allowed from an Interlocutory Order. In other words, it is his contention that the Appellate jurisdiction of this Court is prescribed by Section 128 and the above mentioned Section of the Judicial Code. Prior to the amendment of 1938 of Section 24a of the Bankruptcy Act these two Sections were given consideration by the Circuit Courts of Appeal in determining the right to appeal Final and Interlocutory Orders of the District Court. The reason the Courts took cognizance of these two Sections was due to the italicized language "in other cases" found in the reference to Section 24a of the Bankruptcy Act prior to its amendment. It is to be noted that this italicized language has been omitted from Section 24a as amended in 1938 so that there is no longer any distinction whatsoever between the right to appeal Final or Interlocutory Orders of a District Court.

Prior to the 1938 amendment of Section 24a of the Bankruptcy Act, this Court held that its jurisdiction to entertain an appeal from an Order made in a controversy in bankruptcy was prescribed by Sections 128 and 129 of the Judicial Code and predicated its appellate jurisdiction upon the italicized words above mentioned, "in other cases". In *Bank of America*

National Trust & Savings Association v. Cuccia, (C. C. A. 9) 93 F. (2d) 754, an appeal was taken from Orders of the District Court made in a proceeding in Bankruptcy which this Court held were non-appealable Orders under Section 24a. In discussing its jurisdiction in connection with such Orders had the same been made in a controversy in bankruptcy, this Court speaking through Judge Mathews, said on page 758:

> "Even though it were held that these were orders made in a controversy arising in bankruptcy, they still would not be appealable under Section 24 (a). That section does not authorize appeals from all orders made in controversies arising in bankruptcy, but only from such orders as would be appealable if made "in other cases"; that is to say, in cases other than bankruptcy cases. Moody & Son v. Century Savings Bank, 239 U. S. 374, 377, 36 Am. B. R. 95, 36 S. Ct. 111, 60 L. Ed. 336; Childs v. Ultramares Corp. (C. C. A., 2nd Cir.), 16 Am. B. R. (N. S.) 113, 40 F (2d) 474, 478. *Our jurisdiction in other cases is prescribed by sections 128 and 129 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 225, 227.* Section 128 empowers us to review by appeal final decisions of the District Courts not directly reviewable by the Supreme Court. There was no final decision in this case." (Italics ours.)

It is therefore evident that due to the 1938 amendment of Section 24a of the Bankruptcy Act eliminating the language, "in other cases" jurisdiction of this Court is no longer prescribed by Sections 128 and 129 of the Judicial Code. There is no longer any distinction between the right to appeal Interlocutory or Final Orders in controversies in bankruptcy and the

only limitation placed on the right to appeal is in connection with any order, decree or judgment less than $500.00.

The Trustee therefore submits that a final order was made by the District Court from which he has taken an appeal. This Order reverses the ruling of the Referee in Bankruptcy sustaining an objection to the introduction of oral testimony and by ordering the matter re-referred to the Referee in Bankruptcy directs him to admit the oral evidence to explain and contradict books of account which he prohibited the appellee from introducing. As above stated, even assuming for the purpose of argument that the Order of the District Court is an Interlocutory Order, by virtue of the amendment of Section 24a of the Bankruptcy Act eliminating the language "in other cases" there is no longer any limitation upon the Circuit Court to entertain appeals from all orders in controversies in bankruptcy. The cases cited by the appellee in support of his motion to dismiss the appeal construe Section 24a of the Bankruptcy Act prior to its 1938 amendment and are not in point.

It is therefore respectfully submitted that the motion of the appellee to dismiss the appeal of the Trustee should be denied.

Dated, San Francisco,
September 25, 1939.

GRANT H. WREN,
Attorney for Trustee.

JAMES M. CONNERS,
Of Counsel.

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M. DUCASSE,
Appellee.

CLOSING BRIEF OF APPELLANT.

Counsel for the appellee refers to two exceptions taken by him to the statement of the case by appellant. Although the Transcript discloses that counsel for the appellee during the hearing before the Referee in Bankruptcy attempted to explain the book entries by oral testimony it is evident that such explanation

would materially "vary" his own books of account by increasing the balance owing from $427.57 to $2273.83. Had the Referee permitted him to introduce such oral testimony he would have "contradicted" his own books of account by a very substantial amount. The other exception taken by him to the statement of the case concerns certain language referring to the erroneous ruling of the District Court. We submit that there is no error in so referring to the District Court Order in view of the fact that the error of the District Court reversing the Order of the Referee in Bankruptcy is the ground upon which the appellant predicates the pending appeal.

I.

BOOKS OF ACCOUNT ARE THE BEST EVIDENCE.

The appellee concedes the elementary rule of evidence that books of account are the best evidence of what they contain and contends that he was entitled to introduce parol evidence to explain his books of account when the transaction is the matter in controversy. In support of this contention he quotes from paragraphs 767 and 768 of Volume 2 of Jones Commentaries on Evidence and several California Appellate and Supreme Court cases.

If the effect of the oral testimony which the appellee attempted to introduce before the Referee in Bankruptcy would have established a balance of $427.57 as the amount owing by the bankrupt, which sum also appeared in the books of account of the appellee, then such parol evidence was admissible regardless of the ledger sheets of the appellee. Such a

conclusion is drawn from the paragraphs from Jones Commentaries on Evidence cited by the appellee on pages 14 and 15 of his Brief. Under such circumstances we have an exception to the best evidence rule due to the fact that no attempt is made by the introduction of oral evidence to prove the contents of an account book. However, in the pending matter the oral testimony was not offered for the purpose of proving that the contents of his ledger showed a balance of $427.57 but that a sum approximately $1850.00 in excess of this amount is the balance due him by the bankrupt. It cannot, therefore, be said that the oral testimony is on the same plane with the books of account and such oral testimony, if its introduction had been permitted by the Referee in Bankruptcy, would clearly have varied and contradicted the appellee's own books.

The case of *Maguire v. Cunningham*, 64 Cal. App. 536, is first cited by the appellee in support of his contention that books of account are not the best or sole evidence of transactions reflected in them. An examination of the quotation appearing on page 549 of this case discloses that the oral testimony of persons participating in events of which a record has been made in the books of account is considered to be on the same plane as entries appearing in the books. However, in the pending matter the testimony of the appellee's witnesses would contradict and vary the records in his books of account and under such circumstances the books of account are the best evidence.

A similar criticism can be made of the irrelevancy of the quotation from *Cowdery v. McChesney*, 124 Cal.

363. In this case the Court held that it is proper to prove items appearing in an account by oral testimony of persons having knowledge of the transactions to which the items relate. The Court did not hold that such items could be explained, contradicted or varied by oral testimony. Furthermore, the Court also held that if the items were the result of a written contract between the parties no oral testimony whatsoever was admissible. In the pending matter the items appearing in the appellee's books of account resulted from a Conditional Contract of Sale between him and the bankrupt (Tr. 5). Pursuant to the case thus cited by the appellee no oral testimony is admissible in the pending matter due to the fact that the items in the ledger sheet are the result of this Conditional Contract of Sale.

Counsel for the appellee has failed to quote in full his excerpt from *Argue v. Monte Regio Corp.*, 115 Cal. 575, appearing on page 17 of his Brief. His quoted language from the decision states that oral evidence of persons having personal knowledge of transactions is the best evidence of the items but he has failed to add to this quotation the following language of the Court, to-wit, "where they are not the result of a written contract, as they were not here." This case cites with approval the *Cowdery v. McChesney* case above mentioned and the same comment may be again made relating to oral evidence being only admissible if the transactions are not the result of a written contract. Both of these cases which appellee has cited may therefore be considered as an authority in support of the appellant.

A factual difference is clearly evident in *Bushnell v. Simpson,* 119 Cal. 659. The plaintiff was attempting to recover judgment for his salary as a corporate officer and offered in evidence his own record kept by him of debits and credits in connection therewith. This record in no way tended to vary or contradict the corporate boooks so as to favor the plaintiff and the Court held that his personal memorandum book was proper and material evidence for the purpose of fixing the amount to be deducted from the salary claimed by him. The Court further held that this book could have no weight in determining the amount of the salary which he was to receive prior to deducting the credits as his salary claim was based upon an express contract. The quotation cited by the appellee is merely dicta and has no bearing whatsoever upon the decision of the Court permitting the plaintiff to introduce his personal memorandum book.

Quotations from *Schurtz v. Kerkow,* 85 Cal. 277, and *Bailey v. Hoffman,* 99 Cal. App. 347, were also cited by the appellee. An examination of the facts in the former case discloses that the books and records were introduced in an action to recover one-half of the net profits of a business managed by the plaintiff. The Court held that any witness knowing anything about book entries should have been permitted to testify only in so far as knowledge of the witness related to the source of profits or transactions out of which the same arose. Such testimony, however, was not admitted for the purpose of varying, explaining or contradicting items appearing in the books

and the factual difference between this case and the pending matter is clearly apparent. In the latter case above mentioned it appears that the Court admitted testimony regarding circumstances relating to the matter upon which the item in the account was based. However, such testimony only had reference to facts leading up to the account and did not involve any oral testimony which would vary or change the account.

The Appellant Trustee respectfully submits that the authorities cited by the appellee in no way support his right to prove the balance owing him by the bankrupt by oral testimony. Such oral testimony is not on the same plane as the books of account in view of the fact that the testimony offered by the appellee will vary and contradict his own ledger. His own books are clearly the best evidence of the balance due and this Circuit has held in the *Pabst Brewing Co.* case and the *Schreve* case cited on pages 6 and 7 of the appellant's Opening Brief that books of account are the primary and best evidence of their contents. In the pending matter the sum of $427.57 appears in the appellee's books as the balance owing him by the bankrupt and hence his own ledger is the primary and best evidence of the indebtedness of the bankrupt to the appellee. Any oral testimony to explain, vary or contradict this amount so as to increase the balance owing by the sum of $1850.00 is clearly inadmissible.

II.

APPELLEE'S BOOKS AND RECORDS ARE ADMISSIONS AGAINST HIS INTEREST.

The appellee concedes that his own books and records are admissions against his own interest. This principle of law clearly inures to the benefit of appellant on this appeal. If the appellee is permitted to introduce oral testimony contradicting and varying his own books of account such evidence would permit the appellee to set aside this principle of the law of evidence of admissions against interest whenever an occasion arose to overcome such admissions against interest. Such an occasion is present in the pending matter, wherein the appellee seeks to overcome his admission of $427.57 owing to him by the bankrupt, as shown in the appellee's ledger, by attempting to substantially increase this amount by oral testimony.

III.

DEDUCTION FOR INCOME TAX PURPOSES NOT JUSTIFIED.

The appellee questions the propriety of any reference being made in the appellant's Opening Brief to the reduction of the contract balance for income tax purposes. This question is not a collateral matter but affects the point at issue. In fact the subject of income tax deductions was injected into the proceeding by counsel for the appellee during the hear-

ing before the Referee in Bankruptcy. (Tr. 26 and 27). The appellant relying upon his argument and authorities cited in his Opening Brief (pages 17 to 22 inclusive) submits that the appellee is estopped to change the amount of the contract balance appearing in his ledger. Whether the properly constituted authorities may hereafter take steps to correct any unjustified deductions is a matter that is in no way concerned with this appeal.

CONCLUSION.

It is therefore respectfully submitted that the Order of the District Court should be reversed. This Order overrules the ruling of the Referee in Bankruptcy refusing to permit the introduction of oral testimony to explain, vary or contradict the ledger sheet of the appellee. The entries were made by the appellee based upon debits and credits arising out of a Conditional Contract of Sale and oral evidence cannot be introduced to vary or contradict an account unless there is an absence of a written contract between the parties. This Court has held in two decisions that books of account are the primary and best evidence of transactions between parties and the appellee admits the principle of the law that his books and records are admissions against his own interest. His own ledger sheets must speak for themselves without the benefit of oral testimony to explain them in any way.

Wherefore, appellant prays that the Order of the District Court be reversed with costs to appellant.

Dated, San Francisco,
September 25, 1939.

Respectfully submitted,
GRANT H. WREN,
Attorney for Appellant.

JAMES M. CONNERS,
Of Counsel.

No. 9196

United States
Circuit Court of Appeals
For the Ninth Circuit.

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY,
a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

FILED
JUL - 6 1939
PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9196

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NAMES AND ADDRESSES OF COUNSEL.

BAYLEY & CROSON, and
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Seattle, Washington,
Attorneys for Appellant.

McMICKEN, RUPP & SCHWEPPE,
657-71 Colman Bldg.,
Seattle, Washington,
Attorneys for Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21137

DANT & RUSSELL, INC., a corporation,
Complainant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, INC., a corporation,
Defendant.

COMPLAINT AT LAW.

To the Honorable Judges of the Above Entitled Court:

Complainant, for its First cause of action against the defendant, alleges:

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Paragraph First.

That the complainant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the State of Oregon, and having for its principal business, the purchase and sale, for export, of lumber and lumber products.

Paragraph Second.

That the defendant is now, and at all times herein mentioned was, a corporation duly organized and existing under [2] and by virtue of the laws of the State of Washington, having its principal office and place of business at Aberdeen, Washington.

Paragraph Third.

That on or about the 1st day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver 500,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $14.25 per M feet, Cost & Freight to be paid by seller, for shipment during the month of October, 1936, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, for shipment to Tsingtau, China, and, on or about the 1st day of September, 1936, in confirmation thereof, the defendant (seller) prepared and forwarded to complainant (buyer), its written contract bearing

Seller's No. S4545, amended, and Buyer's No. CX-532, which confirmatory contract was duly accepted by the complainant (Buyer), and there is attached hereto, and by this reference made a part hereof, a full true and complete copy of said contract, marked Exhibit "A".

Paragraph Fourth.

That defendant shipped, in fulfillment of said contract, by bill of lading dated October 28, 1936, on the MS "Panama", 249,141 feet of logs, of the kind and quality so contracted, for which the complainant paid in the manner and at the time specified in said contract, but, although complainant demanded, and was at all times ready, able and willing to accept, the defendant wholly failed and refused to complete said contract under the terms thereof, but, on or about April 2nd, 1937, the said defendant (seller) offered to complete the same at a price of $16.75 per M feet, and complainant (buyer) on April 3rd, 1937, agreed to accept the balance of the logs due under said contract, provided and condi- [3] tioned that such acceptance should be without prejudice to its contractual rights, and which provisions and conditions were approved by the defendant, on April 8th, 1937, the said defendant submitted, and there was executed, subject to such conditions, a contract, copy of which is attached hereto, marked Exhibit "B", and by this reference made a part hereof, under which said conditional contract, the defendant shipped,

under bill of lading, dated May 24th, 1937, on the MS "Nordpol" 253,751 feet Brereton Scale logs for which complainant was obliged to, and did pay the defendant, the rate of $16.75 per M feet.

Paragraph Fifth.

That because of the wrongful failure and refusal of defendant to ship the logs covered by the contract herein designated as Exhibit "A", the complainant was and is damaged in the sum of $2.50 per M feet, on 253,751 feet of logs, amounting to $634.38.

And complainant, for its Second cause of action against the defendant, alleges:

Paragraph First.

The complainant re-alleges, and by this reference, makes a part hereof, all and singular, the allegations contained in Paragraphs "First" and "Second" of its first cause of action herein stated.

Paragraph Second.

That on or about the 4th day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver 1,000,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $13.75 per M. [4] feet, Brereton Scale, Cost & Freight to be paid by seller, for shipment 500,000

feet, October/November of 1936, and 500,000 feet November/December of 1936, at seller's option, for shipment from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, for shipment to Shanghai, China, and, on or about the 4th day of September, 1936, the defendant (seller), in confirmation thereof, prepared and forwarded to complainant (buyer), its written contract, bearing seller's No. S4566. buyer's No. CX-510, which confirmatory contract was duly accepted by complainant (Buyer), and there is attached hereto, and by this reference made a part hereof, a full, true and complete copy of said contract, marked Exhibit "C".

Paragraph Third.

That defendant shipped in fulfillment of said contract, by bill of lading dated October 5, 1936, on the MS "Pleasantville," 502,635 feet, Brereton Scale logs, for which complainant paid in the manner and at the time specified in said contract, and, although complainant demanded, and was at all times prepared to accept, the defendant wholly failed and refused to complete said contract under the terms thereof.

Paragraph Fourth.

That by reason of the defendant's refusal to so perform said contract, and by reason of the commitments made by the complainant, in reliance upon said contract, the complainant was obliged to, and

did purchase, at the best price obtainable, and in open market, 430,084 feet, Brereton Scale, of logs of the kind and quality covered by said contract, and for the account of the defendant, at a cost of $6.25 per M feet, and at a freight cost of $20.00 per M feet, or a total of $26.25 per M feet, and shipped to Shanghai, China, on the SS "Michigan", said logs at a loss of [5] $12.50 per M feet, or a total of $5,376.05, which said loss and damage was suffered and sustained by the complainant, solely as a result of the refusal of the defendant to comply with said contract.

And complainant, for its Third cause of action against the defendant, alleges:

Paragraph First.

The complainant re-alleges, and by this reference, makes a part hereof, all and singular, the allegations contained in Paragraphs "First" and "Second" of its first cause of action herein stated.

Paragraph Second.

That on or about the 28th day of September, 1936, the complainant, as buyer, agreed to buy, and the defendant, as seller, agreed to sell and deliver, 1,-700,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock Logs, of Camp Run Export Grades, at a price of $14.00 per M feet, Cost & Freight to be paid by seller, for shipment from Grays Harbor and/or

Willapa Harbor in the State of Washington, at seller's option, for shipment to Shanghai, China, and for shipment 200,000 feet October/November, 1936, at seller's option, 500,000 feet December, 1936, 500,000 feet January 1937, and 500,000 feet February, 1937, and on or about the 28th. day of September, 1936, in confirmation thereof, the defendant (seller) prepared and forwarded to complainant (buyer), four separate written contracts covering said purchase and sale, being numbered by seller, S4609#1, S4609#2, S4609#3, and S4609#4, and being numbered by buyer, CX-550, CX-547, CX-548, and CX-549, which confirmatory contracts were duly accepted and there is attached hereto, and by this reference made a part hereof, copy of said confirmatory contract, seller's No. 4609#1, [6] buyer's No. CX-550, marked Exhibit "D", and complainant alleges that contracts designated seller's No. S4609#2, S4609#3 and S4609#4, are in all respects identical with said Exhibit "D", except that S4609#2 called for shipment of 500,000 feet in December; No. S4609#3 called for shipment of 500,000 feet in January, 1937, and S4609#4 called for shipment of 500,000 feet in February, 1937.

Paragraph Third.

That defendant shipped in fulfillment of said contract by bill of lading dated October 28, 1936, on the MS "Panama", 170,384 feet, Brereton Scale, from Willapa Harbor, and on March 4th, 1937, on the MS "Grandville," from Grays Harbor, Washing-

ton, 494,176 feet, Brereton Scale, logs, or a total of logs shipped under said contract, aggregating 664,560 feet of logs, Brereton Scale, for which complainant paid in the manner and at the time specified in said contract, and, although complainant demanded, and was at all times prepared to accept, the defendant wholly failed and refused to complete said contract under the terms thereof.

Paragraph Fourth.

That by reason of defendant's refusal to so perform said contract, and by reason of the commitments made by the complainant, in reliance upon said contract, the complainant was obliged to, and did purchase, at the best price obtainable, and in open market, 919,325 feet, Brereton Scale, of logs of the kind and quality covered by said contract, and for the account of the defendant, at a cost of $6.25 per M feet, and at a freight cost of $20.00 per M feet, or a total of $26.25 per M feet, and shipped to Shanghai, China, on the SS "Michigan", from Willapa Harbor, said logs at a loss of $12.26 per M feet, or a total of $11,261.74 which said loss and damage was suffered and sustained by the com- [7] plainant, solely as a result of the refusal of the defendant to comply with said contract;

Wherefore, complainant prays for judgment against the defendant, for the sum of $634.38 on its first cause of action; for the sum of $5,376.05 on its second cause of action; and for the sum of $11,-261.74 on its third cause of action, or, for a total

of $17,272.17, and for its costs and disbursements herein incurred.

BAYLEY & CROSON
Seattle, Washington
ALLEN H. McCURTAIN
Portland, Oregon
Attorneys for Complainant.

State of Oregon,
County of Multnomah—ss:

I, R. J. Darling, being first duly sworn, say that I am Vice-President of Dant & Russell, Inc., complainant named in the foregoing Complaint at Law; that I have read the said complaint, and am acquainted with the facts therein stated, and that the same are true as I verily believe.

R. J. DARLING.

Subscribed and sworn to before me this 16th day of July, 1937.

[Seal] ALLEN H. McCURTAIN
Notary Public for Oregon.

My Commission Expires: Aug. 24, 1940.

[Endorsed]: Filed Jul. 29, 1937. [8]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action, and for answer to complainant's complaint herein, admits, denies and alleges as follows:

I.

Answering Paragraph First of the first cause of action in said complaint, the defendant admits the same.

II.

Answering Paragraph Second of the first cause of action in said complaint, defendant admits the same.

III.

Answering Paragraph Third of the first cause of action in said complaint, the defendant admits the execution of Exhibit "A" attached to the complaint, being written contract bearing seller's number S4545, amended, and buyer's number CX-532, but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the first cause of [9] action in said complaint, defendant admits that the defendant shipped by bill of lading dated October 28, 1936, on the MS "Panama" 249,141′ of logs, of the kind and quality so contracted, for which the complainant paid in the manner and at the time specified in said contract; admits that Exhibit "B" attached to the complainant's complaint was executed on the date therein specified, said Exhibit "B" being seller's number 8873, buyer's number CX-532; admits that defendant shipped, under bill of lading dated May 24, 1937, on the MS "Nordpol" 253,751 feet of logs, and that the complainant paid the defendant therefor at the rate of

$16.75 per M feet; but defendant denies each and every other allegation contained in said paragraph.

V.

Answering Paragraph Fifth of the first cause of action in said complaint, the defendant denies each and every allegation therein contained, and particularly denies that the complainant was and is damaged in the sum of $634.38, or in any sum whatsoever.

For answer to the second cause of action alleged in complainant's complaint, the defendant admits, denies and alleges as follows:

I.

Answering Paragraph First of the second cause of action in said complaint, the defendant admits the same.

II.

Answering Paragraph Second of the second cause of action in said complaint, the defendant admits the execution of Exhibit "C" to the said complaint, being seller's number S4566, buyer's number CX-510, but denies each and every other allegation contained in said paragraph. [10]

III.

Answering Paragraph Third of the second cause of action in said complaint, defendant admits that defendant shipped by bill of lading dated October 5, 1936, on the MS "Pleasantville" 502,625′, Brereton Scale, of logs for which complainant paid in the

manner and at the time specified in said contract; but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the second cause of action in said complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief, and particularly denies that the complainants suffered a loss of $5,376.05 or any other sum whatsoever.

For answer to the third cause of action alleged in complainant's complaint, the defendant admits, denies and alleges as follows:

I.

Answering Paragraph First of the third cause of action in said complaint, defendant admits the same.

II.

Answering Paragraph Second of the third cause of action in said complaint, defendant admits the execution of Exhibit "D" attached to said complaint, being seller's number S4609#1, buyer's number CX-550, and also admits the execution of seller's number S4609#2, S4609#3 and S4609#4, and admits that said last three designated contracts are in all respects identical with said Exhibit "D" except that S4609#2 called for shipment of 500,000′ in December, 1936, number S4609#3 called for shipment of 500,000′ in January, 1937, and S4609#4 called for shipment of 500,000′ in February, 1937. [11]

III.

Answering Paragraph Third of the third cause of action in said complaint, defendant admits that defendant shipped, by bill of lading dated October 26, 1936, on the MS "Panama" 170,384′, Brereton Scale, from Willapa Harbor, in fulfillment of said contract attached to the complaint as Exhibit "D" and identified as seller's number S4609#1, buyer's number CX-550; that on March 4, 1937, defendant shipped on the MS "Granville" from Grays Harbor, Washington, 494,176′, Brereton Scale, logs, in fulfillment of contract identified as seller's number S4609#4, buyer's number CX-549, and that complainant paid for said shipments in the manner and at the time specified in said contract; but denies each and every other allegation contained in said paragraph.

IV.

Answering Paragraph Fourth of the third cause of action in said complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief, and particularly denies that the complainant was damaged in the sum of $11,-261.74, or in any other sum whatsoever.

And for its First Affirmative Defense to the First, Second and Third causes of action alleged in the complaint, and each of them, defendant alleges that a strike of longshoremen in all seaport towns of the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor, Washington, commenced on or about the

28th day of October, 1936, and continued without interruption from said date up to and including the 5th day of February, 1937, and that, by reason of said strike, it was impossible for any person, including the defendant, to move any cargo during [12] said time from Grays Harbor or Willapa Harbor, Washington; and that, by reason of said strike, it was impossible for the defendant to ship or deliver, during the period of shipment agreed upon in said contracts, any of the lumber remaining undelivered under any of the contracts sued upon in said first, second and third causes of action, or any of them; that all of the contracts mentioned in the complainant's three causes of action provided that the defendant should not be liable for nonshipment or nondelivery occasioned by strikes or labor disturbances, and that, by reason of such provisions contained in said contracts, defendant is not liable to complainant for nonshipment or nondelivery of any of the lumber which complainant in its three causes of action alleges was not shipped or delivered.

Wherefore, having fully answered, the defendant prays that the complainant take nothing by its action, and that defendant do have and recover its costs and disbursements herein.

McMICKEN, RUPP &
SCHWEPPE
Attorneys for Defendant. [13]

United States of America,
Western District of Washington,
County of King—ss:

J. P. Herber, being first duly sworn, on oath deposes and says: That he is the General Manager of Grays Harbor Exportation Company, Inc., a corporation, the defendant in the above-entitled action, and makes this verification for and on behalf of said defendant, being duly authorized so to do; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

J. P. HERBER.

Subscribed and sworn to before me this 20th day of August, 1937.

[Notarial Seal] JOSEF DIAMOND

Notary Public in and for the State of Washington, residing at Seattle.

Copy Received Aug. 20, 1937.

BAYLEY & CROSSON.

[Endorsed]: Filed Aug. 31, 1937. [14]

[Title of District Court and Cause.]

DEMURRER

Comes now the complainant in the above entitled action, and demurs to the first affirmative defense set out in the defendant's answer, and to each and every part thereof, on the ground that the same

does not set forth facts sufficient to constitute a defense to the complainant's action.

Dated this 17th day of September, 1937.

By its attorneys

A. H. McCURTAIN

BAYLEY & CROSON.

Copy Received Sept. 18, 1937.

McMICKEN, RUPP & SCHWEPPE

Attorneys for Defendant.

[Endorsed]: Filed Sep. 24, 1937. [15]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRER.

The above entitled cause having come on for hearing upon the demurrer of the complainant to the first affirmative defense set out in defendant's answer, and to each and every part thereof, on the ground that the same does not set forth facts sufficient to constitute a defense to the complainant's action, the complainant appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe, its attorneys, and oral argument having been had thereon and written briefs having been filed on behalf of both parties, and the court being fully advised in the premises;

It is now by the court hereby Ordered that complainant's said demurrer to said first affirmative defense set out in defendant's answer be and the same hereby is overruled, to which order the complainant excepts and such exception is hereby allowed.

Done in Open Court this 23rd day of March, 1938.

JOHN C. BOWEN

United States District Judge.

Approved as to form:

BAYLEY & CROSON

Attorneys for Complainant.

Presented by:

J. GORDON GOSE

[Endorsed]: Filed Mar. 23, 1938. [16]

[Title of District Court and Cause.]

REPLY TO FIRST AFFIRMATIVE DEFENSE.

Comes now the complainant in the above entitled action, and for reply to the first affirmative defense pleaded by defendant's answer, admits, denies and alleges as follows:

I.

Admits that a strike of longshoremen in all seaport towns on the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor, Washington, commenced on or

about the 28th day of October, 1936; denies that the said strike continued without interruption up to and including the 5th day of February, 1937, and, in that behalf, alleges that said strike ended February 4th, 1937; denies that it was impossible for defendant to ship or deliver, during the period of shipment agreed upon in said contracts, the logs remaining undelivered under all of said contracts sued upon in the first, second and third causes of action, and, in that behalf alleges that the defendant could have shipped all unfilled balances of the contracts between the parties, within 30 days after the cessation of said strike, and within the time limited by said contracts, for delivery thereunder; denies that the said contracts provide that [17] the defendant should not be liable for non-shipment, or non-delivery if occasioned by strikes or labor disturbances, or that by reason of such or any of such provisions contained in said contract, defendant is not liable to complainant for non-shipment or non-delivery of any or all of the logs alleged by the complaint to have been due for shipment by the defendant.

And, for a first affirmative reply to said affirmative defense, complainant alleges:

I.

That it was the understanding and agreement of the parties, complainant and defendant, both by oral negotiations leading up to, and by the terms of the, contracts pleaded, that the defendant would

be obliged to ship, all logs called for by the several contracts between the parties, within a reasonable time after, and that the complainant would be obliged to accept shipment within 30 days after, the cessation of any strike which interrupted the prompt fulfillment of said contracts, and, in this connection, alleges that the defendant could have shipped all of said logs remaining unshipped under said contracts, within 30 days, or within a reasonable time from and after the cessation of the strike before mentioned, and that complainant was at all times, prior to the filing of the complaint herein, ready, able and willing to accept delivery of the items un-delivered under the contracts in controversy.

And, for a second affirmative reply to said affirmative defense, complainant alleges:

I.

That it is the custom and usage of the lumber and ex- [18] port trade on the Pacific Coast of the United States of America, that clauses similar to the clauses contained in the contracts between the parties, complainant and defendant, are construed to mean that, in the event of delay in a shipment of logs to foreign ports from any port on the Pacific Coast of the United States, caused by a strike of any nature, that the seller is obligated to ship, at the option of the purchaser, as soon after cessation of the strike as is reasonably possible, and, in this connection alleges that it was within the power of

the defendant to have shipped all of the logs to complainant, in fulfillment of the contracts pleaded, within a reasonable time from and after the cessation of the strike referred to, and within 30 days after cessation of the same, and that, under such usage and trade custom the defendant was liable to ship the balance of said orders, and is liable to the complainant for damage occasioned by its failure to do so.

And for a third affirmative reply to said affirmative defense, complainant alleges:

I.

That subsequent to the cessation of the strike pleaded in defendant's affirmative defense, the defendant did ship various quantities of logs under said contracts to complainant's order, and in fulfillment of said contracts, and as late as May 24, 1937; that by such shipments, the said defendant construed the said contracts to compel delivery on behalf of the defendant subsequent to the cessation of the strike pleaded by defendant, and by such construction, the defendant ratified and approved its liability to make said shipments and all of them, and that defendant ought to be, and is estopped from now contending for or asserting any other or different construction of said contracts, [19] than a construction which renders the defendant liable in damages for its failure to have completed deliveries in accordance with said contracts, as understood by and construed between the parties.

Wherefore, the complainant, having fully replied, prays judgment as in its complaint prayed for.

BAYLEY & CROSON
ALLEN H. McCURTAIN
Attorneys for Complainant.

State of Oregon,
County of Multnomah—ss:

I, R. J. Darling, being first duly sworn, say that I am Vice-President of Dant & Russell, Inc., complainant named in the foregoing reply; that I have read the said reply, and am acquainted with the facts therein stated, and the same are true as I verily believe.

R. J. DARLING.

Subscribed and sworn to before me this 2nd day of April, 1938.

[Seal] ANGELINE KRIARA
Notary Public for Oregon.

My Commission Expires: 6/28/41.

Copy Received 4/4/38.

McMICKEN, RUPP &
SCHWEPPE
Attorneys for Deft.

[Endorsed]: Filed Apr. 5, 1938. [20]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

[21]

Be It Remembered that heretofore and on to wit the 4th day of October, 1938, the above entitled cause came regularly on for trial in the above court before the Honorable John C. Bowen, one of the judges of said court;

The plaintiff appearing by Frank S. Bayley, Esq., of Messrs. Bayley and Croson, and Allen H. McCurtain, Esq.

The defendant appearing by Alfred J. Schweppe, Esq. and J. Gordon Gose, Esq. of Messrs. McMicken, Rupp and Schweppe.

The case being tried before the court without a jury.

Thereupon the following proceedings were had and done, to wit: [24]

The Court: Are the parties and counsel ready to proceed with the trial of the case of Dant & Russell against Grays Harbor Exportation Company?

Mr. Schweppe: Defendant is ready, Your Honor.

The Court: You may proceed.

Mr. McCurtain: If Your Honor please, I suppose it is not fair to assume that Your Honor remembers after a period of months everything that——

The Court: (interposing) You may assume that I have remembered nothing. I have reviewed a good deal of this file, but you can just proceed as if I had not heard anything about it.

Mr. McCurtain: The case hinges upon the construction of a series of contracts entered into between Dant & Russell, the complainant here, and the defendant Grays Harbor Exportation Company, involving the shipment of hemlock logs to the Orient. The first contract which is in dispute was executed on September 1, 1936, and which provided for the sale and delivery of 500,000 feet to Tsingtau, China, delivery to be made cost and freight, at Willapa or Grays Harbor, seller's option, the defendant in this case, Your Honor, being the seller.

Of that order, apparently 250,000 feet were shipped at a date prior to October 28, 1936, at which time occurred a maritime strike, a longshoremen's strike, which prevented the defendant from completing that shipment which called for October delivery to the boat, leaving unfilled approximately a quarter of a million feet on that first order.

On September 4, a contract in all respects identi- [25] cal as to terms was entered into providing for the shipment of a million feet, October and November 500,000, and 500,000 November and December, seller's option. The price on this second lot was $13.75 per thousand, and on the first lot $14.25.

Of this second contract, approximately one-half was shipped prior to the strike which occurred, prior to October 28, and no more.

On September 28 a contract was negotiated which may or may not be construed by Your Honor to be

one contract. The fact is that negotiations leading up to these contracts or contract called for the purchase and sale of 1,700,000 feet; and the buyer, the plaintiff here, specified deliveries on four separate orders of 200,000 to Shanghai, October-November, and of that shipment approximately 170,000 feet was shipped, and no further claim is made concerning that. As to the other three portions of this order, what the defendant called his number 4609, numbers 2, 3, and 4, the plaintiff's numbers CX547, 548 and 549, called for delivery December, 500,000, on which no delivery was made; January, 500,000, on which no delivery was made; and February, 500,000, of which approximately 500,000 was shipped as of, I think the loading date on the boat was March 4 as I recall it, March 3 or 4. The date is immaterial, Your Honor, because the shipment, whether we concede the strike to have been ended as of February 4 or February 5, it was still within the thirty day clause which is one of the subjects or one of the points of controversy in the case; so we make no point of that. [26]

Our pleading says that the strike ended on the 4th day of February. Mr. Schweppe's pleading says on the 5th, but it is immaterial to the case in any event, Your Honor, because this last mentioned shipment of approximately 500,000 in March was within the thirty days, whether the strike be considered to have ended on the 4th or the 5th. So that question of the date is a moot question so far as Your Honor is concerned.

Now, on October 7, a few days after this last series of contracts, identical contracts were entered into between the parties calling for the delivery of a hundred thousand board measure to Hong Kong at $19.00 per thousand. That was split into two orders so far as the plaintiff is concerned, our number C2813 and S2814, that combined in one contract under the defendant's number 4624. The contract called for the delivery of 50,000 feet October, 1936 and 50,000 feet December, 1936.

On October 19, some twelve days later, still a further contract was entered into between the parties which bears the plaintiff's number 2858 and the defendant's S4647, calling for the shipment of 50,000 feet board measure to Hong Kong in the first half of November, 1936.

Now, these last three mentioned contracts are called to Your Honor's attention because of the fact that these, together with all the other contracts, were made on a prined form which has been in general use I believe the evidence will show by the plaintiff for many years, and is in common use with other heavy shippers [27] in this community.

We claim first that the clause in the contract providing for strikes, and providing that the contracts are made subject to strikes, is a delivery clause and not a frustration clause; and we claim that the defendant was bound to ship within a reasonable time after the cessation of the strike, or any other impediment mentioned in the general clause; and we cite these last three mentioned cases to show Your

Honor that the defendant itself, by its own construction of the language of the contract, felt itself obligated to and fulfilled its obligations in March of 1937 to ship three various parcels which its written and printed contracts called for shipment concerning, 50,000 in October, 50,000 in December and 50,000 in the first half of November.

So that by the shipment without any question made or any correspondence concerning or any discussion concerning, the acceptance by the plaintiff of those delayed shipments, placed a construction on these contracts by the defendant which is unanswerable and is controlling in this case.

The strike, as I have stated, occurred October 28; and for the purpose of discussion let us say ended February 5.

After that date, that is to say after February 5, Mr. Connolly, who will be a witness here and who is the Seattle representative of the plaintiff corporation, had a number of conferences with the principal officers of the defendant, at no one of which did the defendant ever make any question about the shipment of all of the mer- [28] chandise called for by these several contracts; but there was considerable discussion as to when the defendant would be able to get vessels to carry the cargoes abroad under the contract.

That situation continued until the 24th of February, at which time the defendant wrote the plaintiff a letter, and while mentioning no cancellation at all, advised the plaintiff that the order which bears

the defendant's number 549, number 4, and which is the February shipment under the contract sued on, together with these other three contracts which I have mentioned as having been made October 7 and 19, were on the line for delivery; and in that letter, made no reference to the acceptance by the plaintiff of these delayed shipments, and again construed all of the contracts, they being all identical so far as the controversial portions of the contract are concerned, as obligating the defendant to ship and the plaintiff to receive; and we so construed it.

After the shipment which they call the February shipment, being their number 4609 number 4, was on the vessel, and ladings had been issued, and bills tendered to us, at that time and then for the first time by letter dated March 6 the defendant took the position that an increase in freight rate of eighty-seven and a half cents on the Shanghai shipments was for the account of the plaintiff. The plaintiff refusing to recognize that construction answered that letter on March 8, and stated that under no circumstances would they assume an additional price; but reminding the defendant of its obligation to ship according to the contract, and as soon as [29] possible after the cessation of the strike.

That date of March 6, Your Honor, which is approximately a month after the end of the strike, was the first notice of any kind that this defendant ever gave to the plaintiff either orally or in writing of any controversy under the contracts whatsoever, and they failed wholly to answer a letter of Febru-

ary 25 concerning these matters in which the plaintiff asked the defendant as to when the former orders numbers C510 or 532 would be shipped. That letter was never answered by the defendant at all. Nor did that letter of March 6 requesting additional freight from the plaintiff answer the letter concerning the previous shipments.

But after March 6, or March 8, the plaintiff's agent Connolly, in conversation with Mr. Herber, the defendant's principal officer, raised some question as to whether they were liable, which resulted in a conference being held in this city on the 18th day of March, attended by myself as attorney for the plaintiff, Mr. Dant of my client firm, Mr. Connolly, Mr. Herber of the defendant firm, and Mr. Schweppe.

At that conference there was produced a copy of a letter dated January 8 addressed to the plaintiff and to be signed by the defendant, but which it is admitted was never forwarded; and March 18 was the first notice of any formal character we had whatsoever that the defendant would claim that the clause in controversy here excused them altogether from performance.

After March 18 there was nothing occurred between the parties which has to do with the controversial [30] question; and I think Mr. Schweppe, counsel for the defendant, will make no question but that the plaintiff did everything within its power to assist the defendant in reducing damages. There will be correspondence offered to complete

the picture before Your Honor showing that the plaintiff offered space to the defendant on certain contract vessels which it could control, and offered to furnish logs at a lesser price than the defendant might have been able to obtain them. At any rate we purchased approximately a million and a half feet to cover the orders which bear their numbers 4609, 2 and 3, and their number 4566, our number 510, which were the November-December shipments on the one contract, and the December-January shipments on the other, at a damage to the plaintiff of approximately sixteen thousand some hundred dollars.

There was still another order, CX532, which was for delivery in October and a portion only of which had been shipped. When that question of buying that lot came up, the defendant said that he had and could ship conveniently I believe on the same March 4 boat as I recall it, that quarter of a million, at a price of $2.50 increase, to which the plaintiff replied that we would not pay the $2.50 increase; but inasmuch as it was a comparatively small matter, for the accommodation of all parties, we would pay the additional $2.50, reserving our rights. That was handled by a letter, and a letter from the defendant agreeing thereto puts in controversy a matter of some $634.00 difference there, which was paid by the plaintiff under a reservation of rights. [31]

Now, the contention of the plaintiff, as made on the demurrer to the further answer, of course is

that this clause upon which they place so much stress is not a frustration clause, but is a clause which was intended to cover a situation which the parties fully expected and fully anticipated meeting, that in all shipping contracts similar clauses are generally inserted; and we will offer to show to Your Honor by competent evidence of men who have been years and years in the business, in the exporting business, here and in Tacoma and up and down the coast generally, that it is the universal and unvarying custom and usage in the trade to treat all such clauses as delay clauses only, and to treat all such clauses as obligating the seller to complete such a contract within a reasonable time after the cessation of the impediment, whatever that may be, whether war, fire, strike, drought, or what not.

We also will contend, as I have already told Your Honor, that—by the way, I should interrupt my general statement to say that to the answer filed setting up this strike clause, we pleaded not only the custom, but that the parties had placed a construction on the contract which we think is controlling upon the court, and which will be proved by the oral conversations as well as the shipment of these other items under the same contract.

We believe we can show also, Your Honor, that the defendant has under the same printed form contract shipped to other purchasers at the old contract price.

I think that fairly states the plaintiff's position in connection with the matter. Mr. Schweppe has

been very [32] kind, and we have gone over the correspondence; and I think we are agreed, Mr. Schweppe, that you have the letter which we wrote you that we called for. I think we will have before Your Honor a complete file of the letters passing between the parties which can be introduced without any question, and we also have here the freight bills which we paid, and the bills we paid with checks evidencing their payment, for the merchandise which was purchased to fill the orders as we claim under their obligation, and as they claim for our own account.

There will be no question as I understand it, Mr. Schweppe—and I am certain there is none on our part—as to the exact dollars and cents involved in the case, nor do they question according to Mr. Schweppe's statement to me that we paid a reasonable price and got as low a freight rate as could be had. So there is no question of the damage involved.

Mr. Schweppe: May it please the court, I will take a few moments to outline the case from the viewpoint of the defendant.

The Court: Before you start to do that, may it be agreed between the parties that the parties will supply the court with a transcript of these proceedings as made from the reporter's notes now being taken by the reporter upon attendance at the trial, and that the cost thereof may be taxed in the case?

Mr. Schweppe: It is entirely agreeable to us.

Mr. McCurtain: It will be entirely agreeable to us, and I assume the practice is that there will be

a copy of that transcript furnished to counsel on either [33] side, or on both sides?

The Court: You can arrange that privately.

Mr. Schweppe: With the reporter, yes.

Mr. McCurtain: I have no objection, Mr. Schweppe, if you agree that those copies be taxed as costs.

Mr. Schweppe: All right; the reporter, instead of making two, will make three, and give one to the court and one to each of the parties.

Mr. McCurtain: And that may be taxed as costs.

Mr. Schweppe: Briefly the case is this, if the court please. In the month of September, 1936, six contracts were negotiated between the plaintiff and the defendant for the shipment of lumber to the Orient. These contracts were all negotiated on the identical contract of sale form which the defendant customarily uses in its business.

These contracts called for the shipment of lumber in different lots, 250,000 feet, 500,000 feet, and so on; and each of these contracts fixed a particular time of shipment.

For instance, if Your Honor will examine the exhibits to the complaint, which are all admitted as being the contracts between the parties, you will note for example that there was a contract for the shipment of 500,000 feet in the month of November; that there was a contract for the shipment of 500,000 feet in January; there was one contract for the shipment of a certain quantity in November or December, seller's option, that is, the seller's option

as to whether it should be shipped in November or December. [34]

Each of these contracts of sale, as shown right on their face, and as counsel for the plaintiff has stated, were made on the basis of cost and freight, or contract and freight as these contracts are sometimes known in the mercantile field. In other words the seller, the defendant here, when it sold lumber to Dant & Russell, the plaintiff here, gave one lump sum price which included the cost of the lumber and the cost of the freight to the Orient.

In other words the seller not only sold the merchandise, but also provided the carriage, made a contract of carriage, and the cost of the freight was included in the contract.

Now, it is admitted here without any question that there was a strike of longshoremen which dated from October 29 to February 4 or 5, 1937. There isn't any argument between the parties, and it is agreed between us that it was impossible to make shipment during that period. Am I right in that?

Mr. McCurtain: Yes.

Mr. Schweppe: It was impossible to make any shipment under these contracts from the 29th day of October until the 5th day of February, 1937, by reason of the prevalence of the strike.

These contracts of shipment, all on the identical form, contained what is commonly known or commonly described as a force majeure clause. That is a clause protecting the seller against liability in shipment in the event certain conditions happen,

such as strikes, lockouts, labor disturbances and the like; and the clause in this [35] particular contract—and in my judgment the construction of this clause is determinative of this controversy; it is a question of law as I see it—reads as follows: "The seller is not liable for delay or non-shipment, or for delay or non-delivery, if occasioned by strikes, lockouts or labor disturbances. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned clauses if so required by the seller, provided the delay does not exceed thirty days."

Let's picture this contract again. It is a contract that calls for the delivery of 500,000 feet in the month of November. The contract period of shipment specified by the parties is the month of November. The contract provides in this clause that the seller shall not be liable for non-shipment or non-delivery within the contract period. It is further provided that the seller may call on the buyer to accept shipment within thirty days thereafter, but that clause obviously is one that is for the benefit of the seller, because it provides "if so required by the seller."

Now, all of the facts relating to these contracts of sale were set up in the complaint, to which the defendant filed an answer in which we briefly set up the fact that between the dates of October 29, 1936 and February 5, 1937 there was a strike of longshoremen in all Pacific Coast ports, and that it was impossible to make delivery during the contract

period of shipment agreed on by the parties on most of these contracts.

It is shown by the record that any deliveries that still had to be made under the contracts after the strike [36] expired were made.

To this answer of ours, setting up the strike—which it is our position permanently excused delivery, because the contract period of delivery expired—the plaintiff filed a demurrer. That demurrer was argued before Your Honor a number of months ago. I think four briefs were filed, two by the plaintiff and two by the defendant; and Your Honor resolved that question by overruling the demurrer to the affirmative defense, holding it at least preliminarily to be a good defense against the cause of action claimed in the complaint, in which the complainant claims that they have suffered damage to the extent of about $17,000.

Now, after Your Honor overruled the demurrer to the answer, in which we set up that the condition had happened which was provided for in the contract, namely, the strike, and that the strike had prevented deliveries from being made during the contract period of shipment, and that therefore delivery was permanently excused, the plaintiff filed a reply; and in their reply they set up certain affirmative matter which is really the only new matter of any character that is presented to Your Honor in this controversy in addition to what was presented at the time of the demurrer, and that new matter consists briefly of this: I think in their first reply

to our affirmative defense they set up that there was an oral negotiation leading up to the making of the written contracts; that in the event a strike occurred the defendant would make delivery within a reasonable time after the strike ceased, although the period of delivery specified [37] by the parties had long since expired.

Secondly, by way of affirmative reply, the plaintiff sets up that it is the custom and usage of the lumber business that clauses similar to the strike clause in the defendant's contract would require the defendant to perform at the option of the purchaser within a reasonable time after the expiration of the strike.

Finally, it is claimed affirmatively that the defendant, after the expiration of the strike, made certain shipments under these contracts, which it is claimed by the plaintiff constitute a construction by the parties as to what this otherwise clear and unambiguous contract means.

Now, as to these three new matters that are brought before Your Honor in the reply, our answer briefly is this: That any attempt of course to show by parol evidence at the time the negotiations were first commenced that an arrangement was made, which is contradicted by the written agreements later entered into and formally signed by the parties, of course would not be admissible in evilence, assuming just for the purpose of argument that the point was even discussed between the parties.

The same is true of the evidence of alleged custom. The law is clear and unequivocal, both in the state and federal courts—and this being a law action we would be bound I take it by the state decisions under the recent ruling of the Supreme Court of the United States—that where the parties have entered into a contract between themselves, and the contract clearly defines the obligation of the parties, any custom that would change the [38] obligation or create an obligation beyond that stipulated by the parties of course likewise cannot be proved, assuming for the moment that there is such a custom; which, at the proper time, if Your Honor should hold this evidence to be admissible, which we think the parol evidence rule prevents, we of course would controvert by evidence.

Finally, it is asserted that certain contracts were carried out after the contract period of shipment had expired, and that that is a construction by the defendants favorable to the plaintiff.

Now, it is pleaded in the complaint that as to one shipment, part of the September 1 contract, I think, a new contract was entered into in April, 1937 at a rate $2.50 higher, which was the increased freight rate applicable to that shipment, and that it was specifically done under an exchange of letters between the parties, that their conduct with reference to the execution of that shipment should be entirely without prejudice.

I may say of course, if the court please, that these controversies arise for practical reasons. The

reason I explained to Your Honor the character of the contract, namely, that my client, the defendant and seller, contracted to sell this lumber on the basis of cost and freight, is of course because that is the manner in which the defendant does business. They contract for the space and they sell the lumber and they sell it at one price. They get the lumber from the mills at a certain figure, they get the steamship rate at so much per thousand at a certain figure, and the two together make the price at which the defendant sells to any buyer such as the plaintiff [39] here.

Now, the evidence of the defendant will show of course that when the longshoremen's strike of 1936 and '37 occurred, the steamship companies who ordinarily had carriage contracts to carry lumber for the defendant of course notified the defendant they could no longer carry, so that the defendant in turn was obliged to rely on its force majeure clause in its contract which relieved it of an obligation which it could not perform.

Now, those are the facts in this case. I think there is very little dispute about it. The plaintiff will offer in evidence, evidence supporting the allegations of the complaint, as to what it actually cost them to get the lumber and the freight elsewhere to carry out these commitments which they in turn had with their buyers in the Orient. We do not dispute those figures. As far as the evidence is concerned on the amount of damages that have been sustained, if the plaintiff has sustained any damage by reason

of breach of contract, we think that their figures represent the reasonable market cost at that time. In other words, as far as the evidence is concerned, the case is in the same condition as it was on demurrer; namely, that we assume the facts alleged in the complaint as far as damage is concerned to be true. We do not controvert the claim of damage.

What we do claim—and this is the question of law involved—is that under the force majeure clause in this contract, where the contract specified definite periods of delivery, and a strike occurred, so that the [40] only period agreed on for delivery by the parties had expired, and shipment could not be made during the contract period agreed by the parties, that performance was permanently excused.

We have pointed out in the briefs on demurrer which are on file, and to which we refer here as a matter of reference, that the great weight of authority supports our conclusion; namely, that where in mercantile contracts the parties agree upon a particular time of delivery, and have also provided for certain conditions which will excuse performance, that if a condition supervenes which makes delivery during the contract period impossible, that delivery is permanently excused, not merely postponed until some reasonable time after the condition which supervened has ceased. Otherwise of course we would get this unusual condition, that if a strike lasted eight months or a year, that it would be the plaintiff's position still that although the

contract period, the only period of delivery on which the parties had agreed, in the light of market conditions as they then understood them, had expired for many months, there was still an obligation to perform within a reasonable time.

Now, the plaintiff contends, if they make the same contention that they made in their brief on demurrer, that while it is true that the contract period had expired, nevertheless we had to deliver after the contract period had expired if they requested it. We could not compel them to take it, but if they requested it, we had to carry out the contract.

Now, as I say, in our view this comes down merely [41] to a question of law. The evidence I think will be largely without dispute, except that we shall object to the evidence under several phases of the affirmative reply which we think under the parol evidence rule is clearly inadmissible.

Mr. McCurtain: If Your Honor please, I did not undertake, nor do I think Mr. Schweppe intended to argue the law of the case in his opening statement; but I do want, in reply to what he has had to say, to make this point so that Your Honor will start with a clear mind as to our respective positions. We do not go so far as to say that a strike might not be of such duration that it would amount to a frustration of the contract; but we say that is a question which this court and all courts having like controversies must necessarily determine as to what is a reasonable length of time.

In other words we do not say that there can be no case imagined where the impediment would be so great or of such long duration that any court or this court would say it would still compel performance; but we say the test and the rule is whether the defendant or the seller can within a reasonable time deliver, and that all the surrounding circumstances of the parties must be considered by each jurist in construction of contracts of like character.

The Court: At this point we will take a five minute recess.

(Recess)

The Court: You may proceed.

Mr. McCurtain: I will call Mr. Darling. [42]

R. J. DARLING,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is R. J. Darling?

A. Yes, sir.

Q. What relation do you bear, Mr. Darling, to the plaintiff, Dant & Russell Inc., a corporation?

A. I am vice president and office manager.

Q. As such, Mr. Darling, do you conduct or handle most of the correspondence concerning its out of town contracts? A. I do, sir.

(Testimony of R. J. Darling.)

Q. The home office of the plaintiff Dant & Russell is in Portland, Oregon? A. Yes, sir.

Q. And it has a branch office here under the control of Mr. J. J. Connolly? A. Yes, sir.

Q. I hand you, Mr. Darling, what bears number CX532 and the date of August 31, the yellow sheet apparently on the letterhead form of Dant & Russell, and ask you to state what that document is?

The Court: Before having the witness refer to it, have the clerk give it an identification mark.

Mr. McCurtain: Very well. If Your Honor please, I have affixed certain documents together in each case, being the order of the plaintiff, the contract submitted by the defendant, and a copy of the shipping instructions of the plaintiff. Perhaps those could each take one exhibit number? [43]

The Court: Yes, it would seem to me to be appropriate.

Q. (By Mr. McCurtain) I will hand you, Mr. Darling, what has been marked by the clerk of this court as Plaintiff's Exhibit No. 1, being a series of documents; and will ask you to identify each and advise the court what each document is.

Mr. Schweppe: If the court please, I think we can shortcut this. All of these contracts are set up in the complaint, and we have admitted them; and if you will take all of these contracts that you have sued on and put them in one file and simply iden-

(Testimony of R. J. Darling.)

tify them as the contracts on which the plaintiff is suing, it is merely evidential affirmance of what is already admitted as a matter of pleading. We can shortcut it perhaps rather than take the full time on each one of these contracts.

Mr. McCurtain: I think that is true, Mr. Schweppe; but I think the witness should identify one series so that each document will be clearly before the court.

The Court: You may proceed.

A. In this list of documents, the first is a copy of our order to the Grays Harbor Exportation Company for 500,000 feet of hemlock logs, to Tsingtau, China, purchased on a cost and freight price from this concern. The second is a copy of their contract which was signed between us covering the same sale. The third is a copy of our shipping instructions to the Grays Harbor Exportation Company instructing them how to make their bills of lading. The fourth in this particular one is the corrected contract, covering 250,000, an unshipped portion [44] which remained after the stevedore strike in 1936 and early '37.

Q. And that subsequent shipment was made, I believe, approximately March 4 on the Granville?

A. Yes, the motorship Granville.

Mr. McCurtain: I then offer this exhibit in evidence, Your Honor.

The Court: Any objection?

Mr. Schweppe: No objection.

(Testimony of R. J. Darling.)

The Court: It is admitted, Plaintiff's 1.

(Plaintiff's Exhibit No. 1, contract and other documents, admitted in evidence.)

(Part of
PLAINTIFF'S EXHIBIT 1)

Grays Harbor Exportation Company, Inc.

Main Office	Seattle Office
Douglas-Weatherwax Bldg.	**Exchange Building**
Aberdeen, Wash.	**Seattle, Wash.**

CONTRACT

September 1, 1936

Buyer: Dant & Russell, Inc., Portland, Oregon.

Commodity: Pacific Hemlock Logs.

Quality: Camp Run Export Grades, per Mackie & Barnes Grading Rules #4.

Inspection: P. L. I. B. Certificate final as to measure, quality and quantity.

Quantity: 500,000′ B. M. Bre. Scale—10% more or less, seller's option.

Specification: Tops 12″/ up, av. 16″ or larger—nothing over 32″-12′ to 32′, av. 16′/up.

12′ and 24′ logs most desired.

Butts to be cut 24′ as far as possible.

Mark:

Price: $14.25 per M′ Bre. Cost & Freight.

Payment: Cash against documents.

Shipment: October.

(Testimony of R. J. Darling.)

From: Grays Harbor/Willapa Harbor, seller's option.

To: Tsingtau, China.

Vessel:

Expected Time of Loading:

General Conditions:

Delivery and/or shipment of material under this contract is subject to acts, requests or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or non-shipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, re- [172] straint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the

(Testimony of R. J. Darling.)

same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.

The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America.

GRAYS HARBOR
EXPORTATION CO., INC.
(J. P. HERBER)
Seller

....

Buyer

Seller's No. S4545 Amended
Buyer's No. CX-532

Buyer must sign and return duplicate of contract immediately. [173]

(Testimony of R. J. Darling.)

Grays Harbor Exportation Company, Inc.

Sales Office	Main Office
Exchange Building	Douglas-Weatherwax Building
Seattle, Washington	Aberdeen, Washington

—Representing—

Manufacturers and Producers of Forest Products on Grays Harbor and Willapa Harbor

CONTRACT

Dated at Seattle, Washington, April 6, 1937.

The Grays Harbor Exportation Company, Inc., as seller, hereby agrees to sell, and the buyer hereinafter named agrees to buy, upon the following terms and conditions:

Buyer: Dant & Russell, Inc., Portland, Oregon.

Commodity: Pacific Hemlock Logs.

Quality: Camp Run Export Grades, per Mackie & Barnes Grading Rules #4.

Inspection: P. L. I. B. Certificate Final as to measure, quality and quantity.

Quantity: 250,000′ B. M. Bre. Scale—10% more or less, seller's option.

Specification:

Tops 12″/up, av. 16″ or larger—nothing over 32″-12′ to 32′, av. 16′/ up.

12′ and 24′ logs most desired.

Butts to be cut 24′ as far as possible.

Odd lengths to be held to a minimum.

(Testimony of R. J. Darling.)

Mark: Hammer mark only.

Price: $16.75 per M′ Bre. Cost & Freight. Insurance for buyer's account.

Payment: Cash against documents.

Shipment: May.

From: Willapa Harbor.

To: Tsingtau, China.

Vessel: M. S. "Nordpol".

Expected Time of Loading: due approx. May 15-20. [174]

General Conditions:

Delivery or shipment of material under this contract is subject to acts, requests or commands of the Government of the United States of America and of any state, including any municipal subdivision thereof, wherein such delivery or shipment is to be made, and all rules and regulations pursuant thereto adopted or approved by the said Government or any such state; and the seller's performance of this contract is contingent upon, and the seller is not liable for delay or nonshipment or for delay or nondelivery occasioned by, acts of God, war, civil commotions, destruction or incapacitation of mill supplying said material for seller, fire, earthquakes, epidemics, disease, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause what-

(Testimony of R. J. Darling.)
soever, whether similar to the foregoing or not, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or expected in bills of lading, or for outturn. Buyers agree to accept delayed shipment or delivery when occasioned by any of the aforementioned causes, if so required in writing by the seller, provided the delay does not exceed thirty days, at the end of which required extension, if any, this contract shall be deemed cancelled, unless expressly extended by further agreement in writing. The conditions of charter party or freight contract governing any shipment made hereunder, and of bills of lading issued with respect thereto, are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyer's account, if it can be obtained.

(Testimony of R. J. Darling.)

The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America.

GRAYS HARBOR
EXPORTATION CO., INC.
(J. P. HERBER)
Seller
DANT & RUSSELL, INC.
Buyer
By (R. J. DARLING)

Seller's No. 8873
Buyer's No. CX-532

Buyer Must Sign and Return Duplicate of Contract Immediately. [175]

Q. (By Mr. McCurtain) Now, please state in like manner, Mr. Darling, as to the documents which I now hand you and which have been marked by the clerk of this court as Plaintiff's Exhibit No. 2? You need not repeat, except to identify the documents.

A. This contains the same documents as in the previous, except that it does not have the copy of the order, and covers one million feet of hemlock

(Testimony of R. J. Darling.)

logs for shipment during October, November, and December of 1936.

Q. I now hand you Plaintiff's Exhibit No. 3 for identification and ask you to make the same statement concerning that?

A. This is a similar contract, covering 200,000 feet of hemlock logs to be shipped to Shanghai during October-November of 1936.

Q. And Exhibit No. 4?

A. Similar documents covering an order for 500,000 feet of hemlock logs, for shipment during December, 1936. [45]

Q. And will you make the same statement concerning Exhibit No. 5?

A. Exhibit No. 5 covers 500,000 feet of hemlock logs for shipment during January, 1937.

Q. And number 6, the same statement please?

A. Number 6 covers 500,000 feet of hemlock logs for shipment during February, 1937; and to this is attached a copy of a bill of lading covering shipment of 494,176 feet by the motorship Granville. The bill of lading is dated the 4th day of March, 1937.

Q. Did your firm consider, Mr. Darling, the shipment of the 494,000 odd as a fair compliance with the order for 500,000 specified by the contract?

A. We did.

Q. Now I hand you Plaintiff's Exhibit No. 7 and ask you to state what those documents are?

(Testimony of R. J. Darling.)

Mr. McCurtain: These are the ones, Mr. Schweppe, that have to do with the lumber to Hong Kong.

Mr. Schweppe: That is the 150,000 or 200,000 feet or whatever it is?

Mr. McCurtain: Yes.

Mr. Schweppe: May I say, for the benefit of the record, and I think Mr. McCurtain will agree, that the six contracts that have been introduced in evidence are the six contracts upon which suit is brought, and which I have admitted to be the contracts between the parties, Exhibits 1 to 6.

Mr. McCurtain: That is correct.

A. Exhibit No. 7 covers a copy of our order C2813, covering 50,000 feet of number 3 common boards for shipment to [46] Hong Kong, and also a copy of the Grays Harbor Exportation Company's contract S4624, covering 100,000 feet, which also includes our order number C2814.

Q. Which, Mr. Darling, is Exhibit 8 for identification?

A. Exhibit No. 8, for shipment during December.

Mr. Schweppe: Each for 50,000 feet?

Mr. McCurtain: No. The point about that, Mr. Schweppe, is this: We gave two separate orders by number 2813 and 2814; and Mr. Herber, your client, made them up on one contract giving them a certain number.

(Testimony of R. J. Darling.)

Q. (By Mr. Curtain) Exhibits No. 7 and No. 8, Mr. Darling, are two separate orders given by you, which the defendant concern wrote up on one contract?

A. That is correct.

Q. Giving it their number what?

A. Their number was S4624.

Q. And do the bills of lading attached to each of these exhibits, namely No. 7 and No. 8, indicate when this lumber was shipped?

A. It was shipped on the motorship Granville, and this particular one is dated March 5, 1937.

Q. Now, I hand you what has been marked Plaintiff's Exhibit No. 9, and ask you to state what that series of documents covers?

A. Exhibit No. 9 covers 50,000 feet of boards for shipment to Hong Kong during the first half of November, Dant & Russell's order number C2858, Grays Harbor Exportation Company's contract S4647, together with shipping instructions and bill of lading covering 48,000 feet shipped on the motorship Granville on the 4th day of March, 1937. [47]

Q. And what is the last document attached to that exhibit?

A. The last document is a copy of the invoice of the Grays Harbor Exportation Company, in which they billed us at the contract price of $19.00.

Q. And the bill was of course paid?

(Testimony of R. J. Darling.)

A. The bill was paid.

Mr. McCurtain: No, if Your Honor please, I offer in evidence first Exhibit Nos. 2 to 6, to complete the file of the exhibits covering the contracts in suit.

Mr. Schweppe: No objection, if the court please.

The Court: Each of them, 2 to 6 inclusive, Plaintiff's Exhibits, are admitted. Each and all of them are admitted.

(Plaintiff's Exhibits Nos. 2 to 6 inclusive, contracts and other documents, admitted in evidence.)

Mr. McCurtain: I now offer in evidence Exhibits No. 7, 8 and 9, being the documents covering the orders of lumber to Hong Kong, as one offer.

Mr. Schweppe: I object to the offer of Exhibits 7, 8 and 9 on the ground that those contracts are incompetent, irrelevant and immaterial, for the reason that they are transactions not sued upon in the complaint. I assume that what plaintiff is proving here is the cause of action set forth in the complaint; and it is our position, and we give as a reason for our objection, that these contracts have no bearing upon the cause of action set forth in the complaint, and are incompetent, irrelevant and immaterial.

The Court: Is there any response on your part? [48]

(Testimony of R. J. Darling.)

Mr. McCurtain: The only response, Your Honor, is this: That we have ample authority to support the view and will submit it to Your Honor if there is any doubt in Your Honor's mind, that the construction placed on a contract in identical terms by the defendant, which shows that it did make without question shipments covering three separate orders, or two separate orders, calling for deliveries as early as October, 1936, in March of 1937; by so doing, they themselves construed the contract adversely to their present contention.

The Court: I am going to admit the documents. As to whether or not they will be sufficient to sustain the plaintiff's position in the case is another matter.

Mr. McCurtain: That of course is debatable.

The Court: The objections to these Exhibits 7 to 9 inclusive are overruled, and each of them is admitted in evidence.

(Plaintiff's Exhibits 7, 8 and 9, contract and other documents, admitted in evidence.)

Mr. McCurtain: If the court please, I will read a stipulation into the record which I believe counsel for the defendant will approve. It is to the effect that Exhibit No. 10, as marked by the clerk of this court, being a check drawn by the plaintiff to States Steamship Company in the sum of $26,-988.18, together with bills of lading and documents attached covering that payment, together with a

(Testimony of R. J. Darling.)

ledger sheet of the plaintiff showing an item of $8,433.81 as paid June 10, 1937, journal entry 276, with three attached invoices receipted by J. M. Ball, representing certain footage of logs and the price [49] thereon, together with a check which balanced the ledger account, indicate and prove payment of the exact damages alleged in the complaint here in action; and that if the court shall find the defendant liable to have delivered the merchandise sued for or covered by the complaint, that the court may then assess the damage as shown by these documents and in the amount claimed in the complaint.

Mr. Schweppe: Yes, we agree to that stipulation. We agree that if the court finds that the plaintiff has sustained any damage by reason of any breach of contract on the part of the defendant and the matters claimed in this suit, that they have suffered the damage alleged in the complaint and shown by these documents.

The Court: Which documents are Plaintiff's Exhibit 10?

Mr. Schweppe: Which documents are Plaintiff's Exhibit 10?

The Court: Let that Exhibit now be admitted. It is so ordered.

(Plaintiff's Exhibit No. 10, cancelled check, ledger sheet and bills of lading, admitted in evidence.)

(Testimony of R. J. Darling.)

Mr. McCurtain: Now, I have here, Your Honor, the file of letter correspondence, and a copy I think of telegrams included, and which contains all of the letters which as I view the situation relate to this controversy, and which are signed by an officer on behalf of the defendant company; and if Mr. Schweppe will produce as per notice the originals of the carbon copies of our letters and telegrams, we may introduce, I think, that entire file as one exhibit. I do not think there is any- [50] thing objectionable, Mr. Schweppe, on either side to the correspondence. That will give Your Honor the complete written file. Or if you prefer, Mr. Schweppe, I have extra copies, and I can just leave the file intact if you will stipulate that the carbons shown and which appear to have been signed by the plaintiff were in fact signed, and that you have received the originals thereof.

Mr. Schweppe: We are perfectly willing to do that. We have copies apparently of the entire file, except this letter of March 8 which you referred to in your notice to produce. We cannot find the original; but it has no important bearing on the controversy. That is, it does not change the rights of the parties one way or the other.

Mr. McCurtain: I think that is true.

Mr. Schweppe: And I will stipulate that this may go in as one file, subject to our opportunity to look at it again and see if we can find any additional ones to go into the exhibit.

(Testimony of R. J. Darling.)

Mr. McCurtain: Very well. And will you also stipulate, Mr. Schweppe, that a copy of a letter which bears date January 8, addressed to the plaintiff by Grays Harbor Exportation Company, was not in fact mailed by the defendant to the plaintiff, but that the copy, as noted in a memo on it, was delivered to me as plaintiff's counsel by your client acting through Mr. Herber on March 18, 1937, in Seattle?

Mr. Schweppe: Yes, we will so stipulate. Now, this is Exhibit 11.

The Court: What you have just been speaking of [51] is Plaintiff's Exhibit 11 for identification.

Mr. Schweppe: Yes, and we agree that it may go into evidence subject to our opportunity to examine it to see if all the letters are there that passed between the parties. This purports to be the file of all correspondence passing between the parties with reference to the subject in controversy here now.

The Court: The court's statement using the words "what you have been referring to," the court meant the file, the entire file which is marked Plaintiff's Exhibit 11. If it is offered, it is now admitted. Do you offer it?

Mr. McCurtain: Yes, I offer it in evidence, Your Honor.

The Court: It is admitted, Plaintiff's Exhibit 11.

(Plaintiff's Exhibit No. 11, letter file, admitted in evidence.)

(Testimony of R. J. Darling.)

PLAINTIFF'S EXHIBIT 11

Grays Harbor Exportation Company, Inc.
Seattle, Washington
September 1, 1936

Dant & Russell, Inc.
Portland, Oregon

S4545—Yours CX-532

We are attaching our amended order S4545 covering 500,000′ Camp Run Hemlock Logs, from which you will note we now show average tops and lengths desired by you.

Please return original order sent you last night, together with signed duplicate of the attached.

GRAYS HARBOR
EXPORTATION CO., INC.
By (M. SANBORN)

Encl MS [176]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
February 24, 1937

Dant & Russell, Inc.
Portland, Oregon

M. S. "Granville"

Confirming our verbal advice to Mr. Connolly yesterday, the following orders for your account

(Testimony of R. J. Darling.)

are on the lineup of the above vessel, now scheduled to arrive our district on/or about March 5:

S4609#4—Your	CX 549
S4624 -	CX 2813-2814
S4647 -	CX 2858

Unless your shipping instructions have been changed, it will not be necessary to send new ones.

GRAYS HARBOR
EXPORTATION CO., INC.

By (M. SANBORN)

MS
CC Mr. Connolly [177]

February 25, 1937

Grays Harbor Exportation Co.,
Exchange Building,
Seattle, Washington.

Gentlemen:

We thank you for your letter of February 24th giving us line-up of the SS "Granville".

However, we wish to refer you to our space contract S4662, covering 85M to 100M Squares for Shanghai, previously booking MS "Panama" and ask if you can advise us when you can nominate a steamer for this order. You might also inform us

(Testimony of R. J. Darling.)

as to our order CX 510, covering 500 M ft. Hemlock Logs for Shanghai.

Yours very truly,

DANT & RUSSELL, INC.

By

HSM:RL

CC Joe Connolly [178]

Grays Harbor Exportation Company, Inc.

Seattle, Washington

March 6, 1937

Dant & Russell, Inc.

Portland, Oregon

MS "Granville"

We refer again to our advice of February 24 that our order S4609 #4—your CX549, covering 500M′ of Hemlock Logs was on the lineup and would be shipped on the above vessel. Please be advised that the increase in freight rate of 87½¢ per M′ Brereton per agreement between shippers and Conference steamship lines on certain pre-strike freight contracts, is for your account.

We will appreciate your immediate confirmation of this understanding.

The freight rate on Hongking remains unchanged.

(Testimony of R. J. Darling.)

We regret that this information was overlooked in our advice of February 24.

GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY
cc Mr. Connolly [179]

March 8, 1937.

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Washington.

Gentlemen:-

Referring to your letter of March 6th regarding shipment of 500,000 feet of Hemlock Logs on the SS. "Granville", we note that you expect to increase the price of these logs by 87½¢, which we presume is increased freight you have been obliged to pay subsequent to the strike.

Under no conditions can we agree to this. We must insist that our orders are filled complete at the contract prices. The freight rates you pay are of no concern to us, if you pay less it is your profit and if you pay more it is your loss.

We are in the same situation you are; our losses for this very same reason will run into many thou-

(Testimony of R. J. Darling.)

sands of dollars. We are living up to our contracts and insist upon you living up to yours.

Very truly yours,

DANT & RUSSELL, INC.

By

cc/Joe Connolly.

RJD:RA [180]

Grays Harbor Exportation Company, Inc.
Seattle, Washington

March 11, 1937

Dant & Russell, Inc.
Portland, Oregon

M.S. "Granville"

We have today drawn sight draft on you in amount of $2,806.98, covering the following parcels shipped per the above vessel:

S4647/8686—Your C-2858 48,000′ Amt. $ 912.00
S4624/8668—Your C-2813
& C-2814 99,736′ " $1,894.98

Attached are copies of all documents covering the above orders.

GRAYS HARBOR
EXPORTATION CO., INC.
By (M. SANBORN)

Encl. MS
CC Aberdeen [181]

(Testimony of R. J. Darling.)

(COPY)

January 8, 1937

Dant & Russell, Inc.
Portland, Oregon

Gentlemen:

We are sorry to advise you that on account of the prevailing maritime strike on the Pacific Coast we are reluctantly obliged to rely on the force majeure clause in the "General Conditions" of our sales contract with you, and to advise you that since non-shipment of the following orders for your account has been occasioned by a strike throughout the contract period of shipment, the contracts are no longer binding or in force:

Bal.	S4545	Amended—Your	CX 532	October
Bal.	S4566	—	CX 510	November/December
Bal.	S4609 #1	—	CX 550	October/November
	#2	—	CX 547	December
	S4624	—	C2813-14	October/December
	S4647	—	C2858	First half of November

If, when the strike is over, conditions enable us to arrive at a mutually satisfactory agreement with you, we shall be glad to cooperate and take a new order for the business covered by the expired contracts.

(Testimony of R. J. Darling.)

We regret to have to give you this advice, but the circumstances leave us no alternative.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.
By

JPH:MS
CC Mr. Connolly

Memo: This copy was delivered in Seattle March 18th when we held conference.

A. H. Mc [182]

Dant & Russell, Inc.
Pacific Coast Lumber and Shingles
Porter Building
Portland, Oregon
March 24, 1937

Grays Harbor Exportation Co. Inc.,
Exchange Building,
Seattle, Washington.

Attention: Mr. Herber

Gentlemen:

We refer to the following contracts we hold with you, viz:

Our No. CX-532, Your No. S4545, 9/1/36, 500M, Pacific Hemlock logs, to Tsingtau, China, shipment October, at $14.25 per M, C. & Frt., on which there is a balance due of 250M.

(Testimony of R. J. Darling.)

Our No. CX-510, your No. S4566, 9/4/36, 1,000,000 Pacific Hemlock logs, to Shanghai, shipment November, at $13.75, C. & Frt., on which there is a balance due of 500M, and

Our orders CX-550, 547 and 548, your numbers 4609 #1, 4609 #2, 4609 #3, 9/28/36, the first of which calls for delivery of 200M, Pacific Hemlock logs, to Shanghai, shipment October, at $14.00, C. & Frt., on which there is a balance of 30M, the second of which calls for 500M Pacific Hemlock logs to Shanghai, shipment December, on which no delivery has been made, and the third, calling for 500M, to Shanghai, shipment January, on which no delivery has been made.

At the conference in your office last Thursday, the 18th Inst., between the writer, Mr. Collins representing China Import & Export Lumber Co. Ltd., Mr. McCurtain, our attorney, yourself, and Mr. Schweppe, your attorney, it was agreed that you would, during the then current week, advise us, in writing, either of your unconditional refusal to treat the contracts as in force, or, would submit some other terms under which you would undertake to fulfill the said contracts. [183]

Inasmuch as you have done neither, and our purchaser is demanding immediate fulfillment of our obligations to him for these logs which we sold based on your commitments to us. This will advise you, that failing to hear from you, not later than

(Testimony of R. J. Darling.)

next Monday, we will purchase logs of the grades and quantities called for by your unfulfilled contracts, in the open market, at the best prices obtainable, will ship the same on the best freight contracts obtainable, and will then immediately undertake, by court action, to hold you for the losses sustained by us because of your refusal to complete your contracts before referred to.

Yours very truly,
DANT & RUSSELL, INC.
By [184]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
March 29, 1937

Dant & Russell, Inc.
Attention C. E. Dant, President
Portland, Oregon

Gentlemen:

This will acknowledge your letter of March 24.

First, as stated at the time of our conference, we do not consider ourselves under any liability to you. Nothing has occurred, including the submission of the memorandum of your counsel, to change our opinion on the subject.

However, without prejudice and with a view to arriving at an amicable solution, we have been constantly working on tonnage for Willapa Harbor

(Testimony of R. J. Darling.)

loading, but unfortunately at this moment we are unable to submit to you a definite proposal.

If you can bear with us for several more days, we will continue our efforts and give you a definite reply, say, not later than Friday, April 2.

The writer was absent from the city the best part of last week and your letter was brought to his attention this morning. That account for the delay.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY [185]

Dant & Russell, Inc. Copy Portland, Oregon
3/30/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Attention: Mr. Herber

Gentlemen:-

This will acknowledge receipt of your letter of March 29, and replying to the same will say, that we will be very glad to give you until Friday, April 2, and while in no wise withdraw our demands for full performance by you, we are willing to help out if possible.

(Testimony of R. J. Darling.)

Since the strike we have chartered ships for ten or eleven cargoes from the Pacific Coast to China and Japan and it might be that we could be of assistance to you in securing space at current rates, or even lower than current rates. All that we could expect you to pay is what we will actually be out of pocket and no more, or no less.

We await any further suggestions you wish to make in the premises.

Yours very truly,
DANT & RUSSELL, INC.,
By

CED:A [186]

Mackay Radio
3/31/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Refer to your letter of March twentyninth Stop If you are unable to arrange space for logs enumerated in our letter of March twentyfourth we can secure for you from States Steamship Company space on steamer Illinois or substitute expected to be ready to load during May Stop Loading at Grays Harbor or Willapa Harbor your option one loading Port Stop Rate to Shanghai twenty dollars per thousand feet Brereton Stop Tsingtau

(Testimony of R. J. Darling.)

fifty cents more Stop This offer is firm good for reply April second

DANT & RUSSELL, INC.

DL:MacKay [187]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
April 2, 1937

Dant & Russell, Inc.
Attention Mr. C. E. Dant
Portland, Oregon

Dear Sirs:

We thank you for your offer of log space, per telegram of March 31, which we regret we cannot use. However, without prejudice to our rights and solely as an offer of amicable adjustment and complete compromise, we are prepared to supply 1,500,000′ of camp run hemlock logs of the usual Shanghai specification, on a basis of $7.50 per M′ f.a.s. Willapa Harbor Lumber Mills' dock, for loading on the S. S. "Illinois", or substitute vessel, loading during May.

Also, we are now prepared to reinstate our order S4545-Your CX-532, for shipment to Tsingtau on a vessel to be declared and loading on Willapa Harbor during May/1st half June, on a basis of $16.75 per M′ Cost & Freight Tsingtau.

This offer, together with that on the Shanghai logs, is good for acceptance received here by noon April 7.

(Testimony of R. J. Darling.)

This is all we can suggest at this time and must, therefore, ask that you be guided accordingly.

Yours very truly,
GRAYS HARBOR
EXPORTATION CO., INC.,
By (J. P. HERBER)

JPH:MS [188]

Dant & Russell, Inc. Copy Portland, Oregon
April 3, 1937.

Grays Harbor Exportation Company,
Exchange Bldg.,
Seattle, Washington.

Attention: Mr. H. P. Herber

Gentlemen:-

This answers your letter of the 2nd inst.

Referring particularly to the first paragraph thereof, wherein you offer to supply 1,500,000 feet of Hemlock Logs, usual Shanghai specification, on the basis of $7.50 per 1000 feet f.a.s. Willapa Harbor Lumber Mills dock, is entirely unacceptable as it would mean that these logs delivered at Shanghai would cost us substantially $27.50 per 1000 feet instead of $14.00 per 1000 feet, as per your contract. Hence, we decline to accept the compromise suggestion.

Referring to the second paragraph of your letter, wherein you offer to ship 250,000 feet, balance due on your order S-4545, our CX-532: We are willing

(Testimony of R. J. Darling.)
to accept the offer without prejudice to our contractual rights, inasmuch as this is a small matter and will only involve a difference of $2.50 per 1000 feet. We suggest that you confirm this offer on the understanding that such confirmation shall be without prejudice to either of our respective positions, subject to the damages accruing under our contracts, which in final analysis means that if we ultimately compromise the 1,500,000 feet due to Shanghai, we will have this much out of the way.

Very truly yours,
DANT & RUSSELL, INC.
By

CED:RA [189]

Grays Harbor Exportation Company, Inc.
Seattle, Washington
April 2, 1937

Dant & Russell, Inc.
Portland, Oregon

Our S4662

Referring to your inquiry as to the disposition of the above reservation of space, there has been no substitution for the MS "Panama".

However, we have a vessel loading at the Grays Harbor Lumber Company during May/June and while, under the circumstances, there is no obligation on our part to do so, we are willing, as a matter of cooperation, to carry out this freight com-

(Testimony of R. J. Darling.)

mitment on the vessel on the condition that you pay the increase of 75¢ per M′ in line with agreement between the shippers and Conference lines on pre-strike freight contracts.

Please let us know immediately whether or not you accept our offer.

GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager

JPH:WJY
ccGrays Harbor Lumber Co.
85M/100 M Space Shanghai
CX500—85M
CX514—12M 2x12 [190]

April 3, 1937

Grays Harbor Exportation Company
Exchange Building
Seattle, Washington

Gentlemen:

Referring to your letter of April 2nd in regard to your space commitment of October 26th, reference S 4662.

Although we are not in accord with you, that you have no obligation in this referred to signed freight contract, we are willing to cooperate and pay the increase rate of 75¢ per M ft, you to ship these two (2) orders for us on your steamer load-

(Testimony of R. J. Darling.)

ing at Grays Harbor Lumber Company during May/June.

However, in our acceptance of this revised condition we wish it to be understood by so doing we in no way waive any point in controversy regarding our other contracts with you.

Yours very truly,
DANT & RUSSELL, INC.
By:

HSM:RL [191]

Grays Harbor Exportation Company, Inc.
Seattle, Washington

April 8, 1937

Dant & Russell, Inc.
Portland, Oregon

In line with your letters of April 3, we attach contracts to cover, duplicates of which please sign and return promptly.

GRAYS HARBOR
EXPORTATION CO., INC.
By (W. J. YOUNG)

Encl.
WJY:MS [192]

(Testimony of R. J. Darling.)

Dant & Russell, Inc. Copy Portland, Oregon

4/9/37

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Gentlemen:-

We have chartered space on the SS "Illinois" for May loading on Willapa Harbor to move some logs we have purchased there.

The freight rate paid by us on this steamer is $20.00 per M feet, which we believe is a little lower than some others are paying, as we sold a cargo today on the basis of $22.00 per M feet (freight) on the MS "Hird", for June/July shipment.

We will leave space open to you until further notice on the SS "Illinois" at $20.00, giving you a chance to fill the orders enumerated in our letter of March 24. In the meantime, if you can charter space or have any other propositions to make we shall be glad to hear from you.

We are returning herewith signed contract No. 8873 and Space reservation No. 8872.

Yours very truly,
DANT & RUSSELL, INC.,
By

CED:A
*enc

Harry Mr. E. has contract and space reservation.

[193]

(Testimony of R. J. Darling.)

4/14/37
Register

Grays Harbor Exportation Co.,
Exchange Bldg.,
Seattle, Wash.

Gentlemen:-

We now must withdraw our offer to you of space on the SS "Illinois", which we made under date of 4/9/37, as we are now compelled to use her to fulfill other commitments, and we could not wait any longer.

We have now arranged for charter of the SS "Michigan" for loading on Willapa Harbor or Grays Harbor, one safe berth, for June Loading—freight rate $20.00 per M feet on Logs, and we wish to give you another opportunity to fill the orders enumerated in our letter of March 24, 1937.

We will leave this space open to you until April 21, 1937.

If you are having difficulty in getting Hemlock logs we can supply them to you on this steamer at $6.25 per M feet, F.A.S. "SS Michigan" Willapa Harbor, which is $1.25 per M feet less than suggested by you in your letter of April 2, 1937.

Awaiting your reply, we are

Yours very truly,
DANT & RUSSELL, INC.
By

CED:A [194]

(Testimony of R. J. Darling.)

Registered Mail

June 17, 1937

Grays Harbor Exportation Co. Inc.,
Exchange Building,
Seattle, Washington.

Attention: Mr. H. P. Herber

Gentlemen:

We direct your attention to an exchange of letters beginning with your letter of April 2nd, our answer of the 3rd, and your reply of April 8th, by which it was agreed that you would ship, in fulfillment of our No. CX-532, at $16.75 without prejudice to our contractual rights.

We now hand you invoice showing a loss to us on the particular item mentioned in such letters, of $634.38, and which invoice also shows our losses on orders unfilled by you under our contracts with you, the aggregate of which is $17,272.17.

In order to reduce our damages to a minimum, we negotiated for, and were able to arrange with our purchaser, to take mixed hemlock and spruce, thus affecting a material saving in price, and we also secured our purchaser's consent to accept ninety (90) per cent delivery, thus reducing the unfilled balances ten (10) per cent, from which it will clearly appear that we have done everything within our power to minimize your losses.

We now re-iterate our previous demands that you immediately arrange to settle the enclosed in-

(Testimony of R. J. Darling.)

voice. Failing to hear from you with satisfactory settlement, will result in our pursuing in court such remedies as the law gives us for the breach of your contract. Thanking you for the courtesy of prompt attention.

Yours very truly,
DANT & RUSSELL, INC.
By

[195]

(Testimony of R. J. Darling.)

Invoice No.	Date June 17, 1937.	DANT & RUSSELL INC.
Your Order	Your No.	LUMBER, SHINGLES
Rate	Shipped to	BOX SHOOK
Sold to Grays Harbor Exportation Co., Inc.,		1101 Porter Building
at Seattle, Washington.	Consigned to	Portland, Oregon
	Via	

MARKS:—

Terms: Cash in exchange for Documents. Payable in U. S. gold Dollars

Camp Run Hemlock Logs, shipped to Tsingtau, China
per MS. "NORDPOL"—Your order #8873, our CX-532:

As per Contract —C & F Tsingtau	$14.25 per M′	
As billed — " "	16.75 "	
253,751′ at difference of	2.50 "	$ 634.38

(Testimony of R. J. Darling.)

Camp Run Hemlock Logs, shipped to Shanghai, China per SS. "MICHIGAN"—your order S4609 #2, our CX-547:

As purchased from you—C & F Shanghai		$14.00 per M′	
Rebought for your account from J. M. Ball—FAS Willapa Harbor	—$ 6.25		
Freight booked for your account with States Steamship Company	—$20.00	$26.25 per M′	
		C & F Shanghai	
462,958′ at difference of		$12.25 per M′	$5,671.24

Camp Run Hemlock Logs, shipped to Shanghai, China per SS. "MICHIGAN"—Your order S4566, our CX-510:

As purchased from you—C & F Shanghai		$13.75 per M′	
Rebought for your account from J. M. Ball—FAS Willapa Harbor	—$ 6.25		
Freight booked for your account with States Steamship Company	—$20.00	$25.25 per M′	
		C & F Shanghai	
430,084′ at difference of		$12.50 per M′	$5,376.05

[196]

(Testimony of R. J. Darling.)

Invoice No.
Our Order
Rate
Sold to Grays Harbor Exportation Co., Inc.,
at Seattle, Washington.

Date June 17, 1937.
Your No.
Shipped to

Consigned to
Via

DANT & RUSSELL
INC.
LUMBER, SHINGLES
BOX SHOOK
1101 Porter Building
Portland, Oregon

Terms: Cash in exchange for documents. Payable in U. S. gold dollars.

MARKS:—
PAGE #2

Camp Run Hemlock Logs, shipped to Shanghai, China
per SS. "MICHIGAN"—your order S4609 #3, our CX-548:

As purchased from you—C & F Shanghai		$14.00 per M′	
Rebought for your account from) J. M. Ball—FAS Willapa Harbor)	$ 6.25		
Freight booked for your account) with States Steamship Company)	$20.00	$26.25 per M′	
		C&F Shanghai	
456,367′ at difference of		$12.25	$5,590.50
		Total —	$17,272.17

[197]

(Testimony of R. J. Darling.)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

GRAYS HARBOR
EXPORTATION CO., INC.
By W. J. YOUNG
(Signature of addressee's agent)

Date of delivery June 18, 1937

(Reverse Side of Receipt)

Post Office Department
Official Business

(Post-marked June 18, 1937
at Seattle, Washington)

Registered Article
No. 214743
Insured Parcel
No.......................................

Return to Dant & Russell
(Name of Sender)
Street and Number
or Post Office Box 309 S.W. 6 Ave.
Portland,
Oregon.

[198]

(Testimony of R. J. Darling.)

Seattle, Washington
June 26, 1937

Dant & Russell, Inc.
Porter Building
Portland, Oregon

Gentlemen:

Attention Mr. C. E. Dant

Your letter of June 17 enclosing invoice of $17,272.17 has been received and has failed of immediate acknowledgment only because of the writer's absence from the city.

We have previously advised you that, under the terms of our contracts referred to in the invoice, we do not deem ourselves liable in any respect for the claim set forth in the invoice.

We are sorry that this situation has arisen, but can only inform you that we adhere to our position.

Very truly yours,
GRAYS HARBOR
EXPORTATION CO., INC.
By (J. P. HERBER)
General Manager.

JPH:MS [199]

Mr. McCurtain: Of course Your Honor understands that the copies are, under Mr. Schweppe's stipulation, admitted to be copies of originals which they hold in their files, and which were received in due course.

(Testimony of R. J. Darling.)

The Court: Yes.

Mr. McCurtain: Now, if Your Honor please, that concludes the plaintiff's case so far as the documentary evidence is concerned and the proof of damage. I have a number of witnesses here on the question of custom and usage, and one in particular who is anxious to get away. I would like to withdraw Mr. Darling, who will also testify on that point, and call another witness with Your Honor's permission for the accommodation of [52] the witness.

The Court: The court wishes to accommodate the witness. You may be excused temporarily.

Mr. Schweppe: We have no objection.

(Witness excused temporarily)

Mr. McCurtain: I will call Mr. Penketh.

A. S. PENKETH,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

by Mr. McCurtain:

Q. Your name is A. S. Penketh?

A. That is right.

Q. P-e-n-k-e-t-h?

A. That is right, sir.

Q. What is your business, Mr. Penketh?

(Testimony of A. S. Penketh.)

A. Lumber exporting.

Q. How long have you been engaged in the lumber exporting business on the Pacific Coast of the United States or elsewhere?

A. Twenty-five years.

Q. And with what concerns have you been connected during that period of twenty-five years?

A. For twelve years I was connected with a firm in England. I was out here buying for their account. Then for the next seven years I was associated with the Douglas Fir Export Company, which at that time was the Douglas Fir Exploitation and Export Company.

Q. And your present connection?

A. As export manager for the Fairhurst Lumber Company in [53] Tacoma.

Q. Mr. Penketh, I ask you to state, based on your experience of twenty-five years in the exporting business, whether there is a general custom or usage in the trade concerning the construction to be placed upon clauses contained in contracts between exporters, buyer and seller, for export shipment, as to the meaning of or construction of a clause relieving the seller from the obligation to ship during a period of strike or like impediment to the shipment.

Mr. Schweppe: If the court please,—

Mr. McCurtain: (interrupting) First I think he may answer whether there is a custom.

Mr. Schweppe: Did you ask him whether there was a custom?

(Testimony of A. S. Penketh.)

Mr. McCurtain: I asked him whether there is in fact such a custom.

The Witness: Yes, there is.

Q. (By Mr. McCurtain) Now, will you state, Mr. Penketh, what that custom is?

Mr. Schweppe: If the court please, I object to this evidence on the ground that it is incompetent, irrelevant and immaterial; that it is a violation of the parol evidence rule; that obviously the contract between the parties must control the rights of the parties, unless the contract is in any way incomplete or doubtful; that the parol evidence rule prevents and that there are numerous authorities to the effect which prevent the introduction of this evidence; and that necessarily evidence of this character could not be given unless the witness knew [54] what the particular clause in question was between the parties.

The Court: That last objection is sustained. You have got to call his attention to some specific provision.

Q. (By Mr. McCurtain) I hand you, Mr. Penketh, what has been marked Plaintiff's Exhibit 1, and call your particular attention to the printed form which is headed "General conditions" on the bottom portion of the second sheet of the exhibit, the particular document being a contract executed by Grays Harbor Exportation Company concerning deliveries to be made under the contract; and I will ask you to examine the clause.

(Testimony of A. S. Penketh.)

A. (Witness examines document referred to.)

Q. Have you examined the clause, Mr. Penketh?

A. Yes, I have examined the first clause here under "General conditions."

Q. Is that clause a usual clause to be inserted in contracts between exporters?

Mr. Schweppe: I object to that, if the court please, as being incompetent, irrelevant and immaterial. Obviously the only thing that this witness can testify to is whether he knows of any custom with reference to the clause which he has just read. That is the only question that can properly be addressed to him,——

Mr. McCurtain: (interposing) I would agree——

Mr. Schweppe: (continuing) —and I renew the objection that any answer on the part of the witness is a violation of the parol evidence rule.

Mr. McCurtain: I should like, Your Honor, to be heard ultimately if we can't get together on the question [55] here.

The Court: You started to make some agreement as to some part of his remarks, did you not?

Mr. McCurtain: Yes.

Q. (By Mr. McCurtain) Mr. Penketh, is there a custom concerning this clause, or is there a custom concerning which this clause would be construed in the trade, a general custom?

A. I should say so, yes.

Mr. Schweppe: May I ask the witness a preliminary question before he goes on? I think it would be quite helpful.

(Testimony of A. S. Penketh.)

Mr. McCurtain: That is your own phrasing of the question you wished, Mr. Schweppe.

The Court: I think not. I believe cross examination would be sufficient.

Mr. Schweppe: All right.

Q. (By Mr. McCurtain) Will you state, Mr. Penketh, what that custom is?

Mr. Schweppe: I object again to the evidence of any custom as to the construction of this clause. The witness has not testified that he has ever seen this clause before, and upon the particular ground that evidence of custom is not admissible where the contract between the parties is plain and clear as in this instance.

The Court: The objection is overruled. The court does not consider the provision in question so clear as not to admit of construction.

Q. (By Mr. McCurtain) Very well, Mr. Penketh; will you answer then please what is the general custom? [56]

A. The general custom in my experience has been and is that any delays caused by these various exceptions that are recognized as requiring protection is only a delay as long as that cause lasts; and that after that cause has been overcome, the contract has been usually considered as being—having to be completed, and has been completed as a general practice.

Q. And at the contract price?

(Testimony of A. S. Penketh.)

A. At the contract price and under the contract conditions.

Mr. McCurtain: That is all.

Cross Examination

By Mr. Schweppe:

Q. Mr. Penketh, have you ever seen that clause before which has just been handed you?

A. Yes, I have.

Q. When did you see it?

A. Oh, I couldn't give you any specific date. I have seen it in contract forms before.

Q. Have you ever seen that particular contract clause before?

A. Well, I don't know how many forms there are printed up like this. I haven't seen this particular form, no.

Q. I mean have you seen a form of the Grays Harbor Exportation Company bearing that language? A. Yes, I have.

Q. When did you see it?

A. I have seen it this year.

Q. How long have you been familiar with the clause? You have not seen it prior to this year?

A. I couldn't say without going through their files when that clause first appeared. I am not prepared to answer [57] that question.

Q. You yourself have had no experience with that clause at all, have you?

A. Yes, I have.

(Testimony of A. S. Penketh.)

Q. In what respect?

A. Because I have made purchases under it.

Q. Do you know how long that clause has been in use by the Grays Harbor Exportation Company?

A. I don't know that.

Q. You have seen it this year?

A. I have seen it this year.

Q. You are in the export business?

A. Yes.

Q. Where do you sell lumber?

A. To Europe, South Africa and South America principally.

Q. Do you know of any custom in the trade with reference to that particular clause, since you have become familiar with it this year?

A. No, I haven't.

Mr. Schweppe: That is all.

Mr. McCurtain: That is all, Mr. Penketh.

(Witness excused)

Mr. McCurtain: Now I should like to call at this time Mr. Joe Connolly. [58]

JOE J. CONNOLLY,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Joe J. Connolly?

A. That is right.

(Testimony of Joe J. Connolly.)

Q. What relation do you bear, Mr. Connolly, to the plaintiff firm, Dant & Russell, Inc.?

A. Seattle representative.

Q. How long have you been acting in the capacity of Seattle representative for that firm?

A. Six years.

Q. Do you know the defendant corporation, Grays Harbor Exportation Company?

A. I do.

Q. Is it a fact—this is leading, Mr. Schweppe, I think you will agree——

Mr. Schweppe: That is all right.

Q. (continuing) ——is it a fact that you are the agent who negotiated the various contracts which you have heard discussed here and which are in suit here?

A. That is a fact.

Q. With whom did you deal, that is, what officer or agent representative of the defendant concern did you deal with concerning those contracts?

A. The original negotiations were with Mr. Herber.

Q. That is Mr. J. P. Herber? A. Yes.

Mr. McCurtain: Mr. Schweppe, Mr. Herber is the president, is he not? [59]

Mr. Schweppe: No, but he is the general manager.

Mr. McCurtain: He is the executive head?

Mr. Schweppe: He is the executive head of the defendant.

(Testimony of Joe J. Connolly.)

Q. (By Mr. McCurtain) Now, state to the court what did in fact transpire with relation to these several contracts as to the purchase of the quantities of logs covered thereby? I mean leading up, Mr. Connolly, to the making of the contracts?

A. Well, the negotiations were actually started in Portland. The Portland office gets an inquiry for an order for a certain special bill of goods or lumber. They contact me usually by phone and give instructions to canvass the market here to see just what price and what terms this particular parcel or parcels of lumber or logs can be obtained for. In this particular case we were contacted on this business by the Grays Harbor Exportation Company by Mr. Herber. I in turn passed those quotations down to Portland, and after the passage of—I am not certain just how many cables to our buyer in Shanghai, the order was eventually closed.

Q. I take it, Mr. Connolly, that there was nothing in those negotiations which was in any sense at variance with the written contracts?

A. Not a thing.

Q. In other words neither you nor Mr. Herber discussed at those preliminary dickerings, if I may so call it, as to price and terms, as to the legal or formal documents to follow?

A. There was no question of that at all. [60]

Q. Now, you of course were familiar with the quantities and the shipping dates required under the contracts which are in evidence here?

(Testimony of Joe J. Connolly.)

A. I was.

Q. Now, I want you to state, Mr. Connolly, how many times if you can, or if not, with what frequency, you saw Mr. Herber or any other representative of the defendant concern subsequent to February 4 or 5, 1937?

A. Subsequent to that?

Q. Yes, subsequent to the end of the strike, which was either the 4th or 5th of February, 1937.

A. It is difficult to say just how many times. I would say conservatively at least two or three times each week.

Q. And what, Mr. Connolly, was the subject of your conversations with the defendant concern subsequent to the cessation of the strike?

A. All the conversations I recall were as to when the various contracts were to be shipped.

Q. What if anything was said to you at any of those conferences subsequent to February 5, 1937 as to the liability of the defendant to fulfill the contracts at a later date?

A. I do not recall any, that is, up until the time when they definitely went on record that they would not ship.

Q. And when would you say was the time, Mr. Connolly, when as you state it they definitely went on record as to that?

A. It was immediately after we had received the documents on that February portion, which they shipped under the contract price, that portion of

(Testimony of Joe J. Connolly.)

the contract which called [61] for February shipment; but in any event, they handed us the documents and said that that was a completion of the February portion, and that they were not liable for the shipment of anything that should have been shipped during the strike months.

Q. That would be approximately March 5, 1937?

A. That is about right.

Q. Would that be the approximate date?

A. Yes, sir.

Q. Was there any discussion, Mr. Connolly, as to when the defendant expected to ship these various cargoes?

A. There was considerable discussion.

Q. That is to say, discussions between the end of the strike and March 5?

A. There was. Mr. Herber was good enough to keep in touch with us and advise us of the negotiations he was having with the steamship company, whom I recall was a firm domiciled in San Francisco, with whom he carried on his negotiations direct rather than through their local representative.

Q. Do you know what lines they represented?

A. The Klaveness Line. These wires that Mr. Herber showed me were not addressed to the line or signed by the line, their replies. In each case as I recall it they were signed by the manager. I am sorry; I don't recall that name.

Q. And they had to do with space contracts which he was attempting to negotiate?

(Testimony of Joe J. Connolly.)

A. When various vessels would be put into Willapa or Grays Harbor. [62]

Q. Were you present, Mr. Connolly, at a conversation or conference, if I may so term it, had in Mr. Herber's office, that is to say the office of the defendant concern, on March 18, 1937, at which were present Mr. Schweppe, counsel for the defendant, myself, Mr. Dant, yourself, and I think Mr. Collins from China? A. I was.

Q. After that conference of March 18, 1937, what if anything was said to you by Mr. Herber or any other officer of the defendant concern concerning the fulfillment of the contracts?

A. Well, as I recall either yourself or Mr. Dant wanted to know at that time just what the status of those contracts was. From there on in I frankly don't recall any discussion of those except the letters we got.

Q. Do you recall what if any statements were made by the defendant or Mr. Herber as its representative at that conference as to whether they would or would not in fact complete the contracts?

A. No. He refused to go on record as I recall it on that right at that time, although the point isn't particularly clear in my mind.

Q. Mr. Connolly, during the period from October 28, 1936 to the 5th of February, 1937, and particularly on or about January 8, 1937, what if any conversation did you have with Mr. Herber or other representatives of the defendant concern concerning the fulfillment of these contracts?

(Testimony of Joe J. Connolly.)

A. None. The question of those contracts was not discussed during the period that the strike was on.

Q. No discussion whatsoever as far as you recall? [63]

A. No. There may have been general discussion, but there were no specific statements made either way regarding those contracts during the month that the strike was in progress.

Q. And that continued, as I now understand your testimony, up to sometime approximately the 6th of March? A. That is right.

Mr. McCurtain: I think that is all.

Cross Examination

By Mr. Schweppe:

Q. Mr. Connolly, you had been advised, had you not, by Mr. Herber when you began having conversations with him about these contracts, that the steamship companies had cancelled the underlying space contract on these shipments?

Mr. McCurtain: Just a moment. I object to that as not proper cross examination and as wholly immaterial. I think it makes no difference, Your Honor, whether the defendant had difficulty in getting space or not. I think the test can never be difficulty of performance. The question is liability of performance. In other words I take the position that any inquiry of any witness as to troubles Mr. Herber or his concern were having to get space——

(Testimony of Joe J. Connolly.)

Mr. Schweppe: (interposing) He has already testified, Your Honor, that Mr. Herber showed him certain telegrams passing between them and the steamship companies, that he was consulted on it. All I am asking him is whether or not he was not specifically advised that the underlying freight contracts with respect to the shipments here in evidence had been cancelled by the steam- [64] ship companies.

Q. (By Mr. Schweppe) Mr. Herber so advised you, did he not?

A. I have never been advised that Mr. Herber had ever booked this space, so I am not in a position to say whether it was ever cancelled.

The Court: I will rule that the question objected to is proper.

Mr. McCurtain: I have no objection, Your Honor. I misunderstood the question.

The Court: It is within the scope of the direct examination.

Q. (By Mr. Schweppe) I merely asked you, Mr. Connolly, whether or not you were advised that the steamship companies who were to carry this cargo had refused to go forward with their commitments at the time Mr. Herber showed you these telegrams that you were talking about?

A. Well, the last telegram that I recall, Mr. Schweppe, was the steamship line's refusal——

Q. (interrupting) I am merely asking you a question that you can answer yes or no. Were you or were you not advised that the steamship com-

(Testimony of Joe J. Connolly.)
panies had cancelled their shipping contracts and refused to go forward?

A. Would you mind putting that "cancelled this particular contract"? I don't want to answer that question in generalities. In other words, if you will ask me if they cancelled this particular contract that he had booked, I am in a position to answer.

Q. Well, answer that question then the way you have limited it. What is your answer to that?

A. No. [65]

Q. He did not advise you? A. No.

Q. You knew however, did you not, Mr. Connolly, that at the cessation of the strike, because of the long suspension of business, freight rates had moved up very sharply for ocean shipping to the Orient? You did know that? A. Yes.

Q. And you did know that the cause of the conference and of the argument between yourself and Mr. Herber was on account of the freight rates, isn't that right?

A. No, I don't think that is quite so, freight rates. Just what argument between myself and Mr. Herber are you referring to?

Q. Didn't the discussion—of course I am just trying to follow out your direct examination. You said that you had some conferences with Mr. Herber in which you were shown some telegrams passing back and forth between him and the Klaveness Line? A. That is true.

(Testimony of Joe J. Connolly.)

Q. Now I am asking you whether it is not a fact that you knew that the difficulty which existed at that time was over freight rates?

A. Oh, yes, I think so.

Q. Yes, that was my question.

The Court: Is there any reason why this witness cannot be here this afternoon?

Mr. McCurtain: No, there is no reason.

The Court: Then court is recessed until 2:00 o'clock this afternoon. [66]

(Whereupon a recess was taken until 2:00 o'clock P. M. of this day, October 4, 1938, at which time proceedings were resumed as follows:)

The Court: You may proceed.

Mr. Schweppe: I believe Mr. Connolly was on the stand.

JOE J. CONNOLLY

resumed the stand.

Cross Examination

Resumed.

By Mr. Schweppe:

Q. Isn't it a fact, Mr. Connolly, that on the 11th day of January, 1937, Mr. Herber called you over to his office and explained to you that the steamship company had cancelled the space commitment, and that the Grays Harbor Exportation Company

(Testimony of Joe J. Connolly.)
would not go forward with the Dant & Russell orders which are here in controversy?

A. I am sorry; I do not recall that.

Q. You don't recall it? A. No.

Q. You would not say that that may not have been a fact?

A. I wouldn't be prepared to say that, no.

Mr. Schweppe: That is all.

The Court: Any further questions?

Redirect Examination

By Mr. McCurtain:

Q. I did not understand, Mr. Connolly, the last answer.

Mr. Schweppe: He said he would not be prepared to say that that was not the fact.

Q. That is, you are not certain whether he did not call you over on January 11 and tell you that he would not go forward with them? [67]

A. I frankly do not recall the incident at all.

Q. You have no recollection of it?

A. No. It is not a question of the date; I don't recall that.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Connolly.

(Witness Excused)

Mr. McCurtain: Will you take the stand, Mr. Darling, please?

The Court: You may resume the stand; you are already under oath.

R. J. DARLING,

recalled as a witness on behalf of the plaintiff, being previously duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. How long, Mr. Darling, have you been engaged in the exporting business?

A. Twenty-eight years.

Q. Are you entirely familiar with the clause in the contract concerning which you testified this morning? A. I am.

Q. What is the fact as to whether there is or is not a general custom for the construction of that or similar clauses in contracts by exporters generally?

Mr. Schweppe: I make the same objection that I made this morning, if the court please, on the ground that the question elicits an answer which would be in violation of the parol evidence rule; which would violate this contract, which is clear and explicit upon its face, [68] and specifically provides that this contract contains the entire engagement between the parties. I further object upon the ground that the question calls for a statement as to a general custom, without limiting it to the particular contract here in question.

The Court: That last objection only is sustained. Call his attention to the specific wording of the contract about which you are asking him to state whether or not there is a custom.

(Testimony of R. J. Darling.)

Mr. McCurtain: I have some authorities on the proposition of proving general custom; and I have felt, as has my associate, that perhaps Your Honor has not fully understood our position on that. We believe, as lawyers, that the question is not only as to the particular clause, but as to a custom in the trade concerning clauses in their general intent and effect that are the same. Mr. Schweppe wholly misunderstands our position with respect to the right to prove custom. The authorities are quite unanimous in holding that custom is not proved for the purpose of varying the contract, nor do we seek to in any respect vary the terms of this contract. We seek to aid the court in its construction by custom, which we think is clearly admissible under the authorities which we are prepared to submit to Your Honor on that point.

The Court: The only thing in question is the meaning of that phrase.

Mr. McCurtain: That is true.

The Court: Not a phrase in some other contract.

Mr. Schweppe: If I may make this observation, if [69] the court please, the authorities, going on the assumption of Your Honor's ruling, are very plain that in a case where evidence of custom is admissible, it is admissible only on the theory that the parties contracted with reference to it knowingly, and that it is part of their agreement. Now, obviously a custom with reference to some other agreement and not the agreement between the

(Testimony of R. J. Darling.)

parties cannot be relevant to the controversy. There is a very excellent decision in 112 Federal that brings that out.

The Court: The court has that view of the matter. You may in this instance ask him concerning what bearing if any any custom had upon the meaning the parties had in mind in using this language in this contract in question.

Mr. McCurtain: Very well, Your Honor.

The Court: That is the only objection of the defendant that is sustained, and an exception is allowed if an exception is preserved.

Q. (By Mr. McCurtain) Will you state, Mr. Darling, what is the custom of the trade with reference to the construction of a contract, having the language of the contract involved in this suit in mind?

Mr. Schweppe: I make the same objection.

Mr. McCurtain: He has already testified——

The Court: (interposing) He has not stated any particular provision nor has his attention been called to any particular provision. Point out that contract to the witness.

Q. (By Mr. McCurtain) I refer, Mr. Darling, to Exhibit No. 1, and call your attention particularly to the type- [70] written clause headed "General conditions," and ask you whether you are entirely familiar with the language of that clause?

A. Yes. I put a great deal of study on this, as in many other contracts which are worded somewhat differently; but still——

(Testimony of R. J. Darling.)

Mr. Schweppe: I object to testimony, if the court please, as to any other contracts which are worded differently.

The Court: That is sustained. You must respond to that particular language.

Q. (By Mr. McCurtain) You must limit your answers then, Mr. Darling, to the particular language here used, or in the contract you have in your hand. Then I will ask you again to state whether there is a custom with reference to that particular phrasing in contracts?

A. Well, I have read this over, and I can't see where it does anything but extend the time of shipment. It excuses delays——

Mr. Schweppe: (interrupting) If the court please, I move to strike the answer, because we are not asking the witness' construction of the contract.

The Court: That will have to be granted. It is so ordered stricken.

Mr. McCurtain: I think that that is correct, Your Honor.

Q. (By Mr. McCurtain) Look, Mr. Darling; the court rules that I must direct the inquiry, and you must limit your answer, to a question of whether there is a custom with respect to the particular language used in this contract [71] in suit?

A. I would say there is.

Q. You would say there is such a custom?

A. Yes.

Q. Then state, please, what that custom is.

(Testimony of R. J. Darling.)

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection will be overruled. Do you preserve an exception?

Mr. Schweppe: Yes.

The Court: Exception allowed.

A. I would say that delivery would have to be made after the causes——

Mr. Schweppe: (interrupting) If the court please, I move to strike that answer. We are not asking this witness' idea as to what he would say.

The Court: That is right. The motion is granted. It is stricken. Have in mind the form of the question, and answer that and nothing else.

Q. (By Mr. McCurtain) The question is, Mr. Darling, whether there is a custom concerning this particular language? A. Yes.

Q. And if so, what that custom is; not what you would say, but what that custom is.

Mr. Schweppe: I make the same objection, for the record.

The Court: The same ruling, the objection being overruled to that.

Mr. McCurtain: Now, will you read the question please? [72]

(The question was read by the reporter.)

A. The custom is that as soon as the causes for this delay are removed, the shipment must be made.

Q. (By Mr. McCurtain) And what, Mr. Darling, would you say as to the reasonableness of the

(Testimony of R. J. Darling.)
time, or how long a time would be allowed as reasonable after a delay of a strike of approximately three months?

Mr. Schweppe: May I put in the record one objection to this line of testimony, upon the ground that it is not admissible in evidence as violating the parol evidence rule with reference to the contract here in question?

The Court: You may note that objection again, and the court overrules it; but as made to this last question, that again does not come within the court's limitation. You are asking him something other than the custom, or he would be permitted to answer something other than the custom.

Mr. McCurtain: Perhaps that question can best be reframed by asking the witness another question then, Your Honor.

Q. (By Mr. McCurtain) Is there a custom, Mr. Darling, concerning a clause identical with this, as to how long would be allowed after the cessation of the impediment?

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: You are asking now for the custom?

Mr. McCurtain: Yes, I am asking for the custom. [73]

A. It would depend entirely upon the quantity involved and the conditions that prevailed after the strike or other impediment had been removed.

(Testimony of R. J. Darling.)

Mr. McCurtain: Now, if Your Honor please, for the purpose of the record I would like to offer to prove by this witness and others whom I have present in the courtroom what the general custom is as to this clause or clauses of similar import and tenor generally used in contracts throughout the trade. I know in advance under Your Honor's previous ruling what the ruling will be, but I would like to make that offer for the sake of the record.

The Court: The offer relating to the situation as to other or similar contracts is denied. You have already been allowed to inquire of this witness concerning the custom as applied to the particular provision in issue here.

Mr. McCurtain: You may cross examine.

Cross Examination

By Mr. Schweppe:

Q. Mr. Darling, how long have you been familiar with that contract form which you have in your hand, taken from Plaintiff's Exhibit 1?

A. We have shipped on that contract these shipments here. How many more, I could not say; some. Probably a year or two.

Q. Would you say that you had seen any of those contracts in that form prior to 1935?

A. No, I wouldn't.

Q. Now, since 1935 do you know of any condition of strike or [74] other condition falling within the terms of that contract which has raised the

(Testimony of R. J. Darling.)
question of performance after the date fixed in the contract for performance? Let me put it in another way. There was a longshoremen's strike in 1934, was there not? A. Yes, sir.

Q. There was a longshoremen's strike in 1936 and '37, between October and February?

A. Yes, sir.

Q. Now, aside from those two situations, do you know of any instance in which, under your testimony as to custom, delivery was ever made under that form of contract subsequent to the time specified for delivery in the contract? Are you specifically aware of any instance?

A. No, I am not.

Q. As a matter of fact, Mr. Darling, when you say that you believe there is a custom with reference to this particular clause, you are just giving your opinion about it, isn't that it?

A. Well, that is all I can do.

Q. Isn't it a fact——

A. (interrupting) I have been twenty-eight years in the export business.

Q. Isn't it a fact that you said you had given that clause considerable study? A. Yes.

Q. And that the statements you have here given on the witness stand are based on the study of that clause? A. That is right.

Q. Under this evidence of custom that you have testified to, [75] it is your idea that after the contract period specifically provided in the contract

(Testimony of R. J. Darling.)

has expired, for instance a contract specifying November shipment, that the buyer is required to take the merchandise in December or January?

A. No, sir.

Mr. Schweppe: That is all.

Redirect Examination

By Mr. McCurtain:

Q. Mr. Darling, did you have experience with this particular contract with the defendant concern in 1934, do you recall?

A. I couldn't be sure of that.

Q. You could not be sure of it? A. No.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Darling.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Haig.

NEIL HAIG,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Neil Haig? A. Yes.

Q. What business are you engaged in, Mr. Haig? A. The lumber export business.

Q. How long have you been so engaged?

A. Since 1913.

(Testimony of Neil Haig.)

Q. And with what concerns?

A. W. L. Comyn, Douglas Fir Exploitation, Northwest Spruce, [76] and the Pacific Coast Spruce Company.

Q. How long were you with the Douglas Fir Exploitation Company?

A. Nine and a half years.

Q. And you are now engaged in the export business? A. Yes.

Q. With whom are you now engaged?

A. Pacific Coast Spruce Corporation.

Q. And your capacity with them? In what capacity are you engaged?

A. General manager.

Q. I hand you a contract which is a part of Plaintiff's Exhibit No. 1, and will ask you to read carefully the clause in printing which is labeled "General conditions" at the foot of the contract, so as to familiarize yourself with it.

A. (Witness refers to the exhibit in question.)

Q. Mr. Haig, have you familiarized yourself with the wording of the contract? A. Yes.

Q. I will ask you to state whether there is in the trade, namely, the export trade, a general custom or usage concerning the construction of that contract, that portion of the contract which relates to its performance being subject to delay, non-delivery and so forth, as affected by strikes or other causes enumerated there?

Mr. Schweppe: I make the same objection that

(Testimony of Neil Haig.)

I previously made with reference to the testimony of other witnesses relating to custom. It violates the parol evidence rule. I understand that you limited your ques- [77] tion particularly to this clause?

Mr. McCurtain: I undertook to do so.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: Exception allowed. You may answer.

The Witness: Will you give me that question again?

(The question was read by the reporter.)

A. Yes, there is a custom.

Q. (By Mr. McCurtain) What is that general custom?

Mr. Schweppe: I make the same objection, if the court please, and ask an exception to Your Honor's ruling.

The Court: The same ruling, the objection being overruled and an exception allowed. What is the custom relating to that language or construction?

A. Well, the custom has been to make delivery of the goods contracted for after the period that was named in the contract, if a strike or other unforseen circumstance occurred that prohibited the seller from making delivery in the time specified.

Q. Is there any general custom as to within what time after the cessation of the strike or impediment that may be made?

Mr. Schweppe: I make the same objection, if the Court please.

(Testimony of Neil Haig.)

The Court: Overruled.

A. Well, there has been a custom of thirty days, but it has often been extended by mutual agreement between the buyer and the seller.

Q. Would the length of the strike or the length of the continuance of the impediment affect the custom? [78] A. Very possibly it would.

Mr. McCurtain: That is all, Mr. Haig.

Cross Examination

By Mr. Schweppe:

Q. Mr. Haig, I noticed you very carefully reading the language of that contract which you have in your hand, which is a part of Plaintiff's Exhibit 1. Have you seen that contract before?

A. Well, I won't say word for word, but it is extremely similar to a contract that I operated under for a considerable time.

Mr. Schweppe: If the court please, I now move to strike the testimony of the witness, because he now says that his testimony is not with reference to a contract word for word like this one but some other contract which the witness deems to be similar.

The Court: Well, I think he ought to be able to say, if he knows, what the custom is with reference to the provision there in question.

Mr. McCurtain: I understood him to so testify.

The Court: I did too, but now on cross examination he limits that.

(Testimony of Neil Haig.)

Mr. Schweppe: He limits it now to some similar contract that he is familiar with, not to this one.

Q. (By Mr. McCurtain) Are you familiar, Mr. Haig, with the contract used by Douglas Fir Export over a period of years? A. Yes.

Q. (By Mr. McCurtain) Can you point out to the court wherein this language differs? [79]

A. Well, that is extremely hard without the other one here.

Mr. McCurtain: I have a copy of that contract here which I propose later to introduce in evidence.

Mr. Schweppe: Well, if the court please, I still think that unless the contract is identical, it is not admissible.

The Court: I think that you may further examine this witness, and the court at this time will deny your motion to strike.

Q. (By Mr. Schweppe) All right. Mr. Haig, you have never bought any merchandise covered by the terms of the contract with that language in it from the Grays Harbor Exportation Company, have you? A. No.

Q. As a matter of fact you have been connected for a good many years with the Douglas Fir Exploitation Company, have you not? A. Yes.

Q. Which has been a competitor in the export field of the Grays Harbor Exportation Company?

A. I wouldn't say a competitor.

Q. To some extent? A. No.

Q. When did you first see that contract with that

(Testimony of Neil Haig.)

language in it, Mr. Haig? Have you seen it before today as far as you know now?

A. No, I don't think I have.

Mr. Schweppe: I renew the motion to strike the answers of the witness.

The Court: The motion is denied. The court will [80] consider the testimony given by the witness on both direct and cross examination.

Q. (By Mr. Schweppe) Well, having answered that question that way, I need not ask you whether you saw that contract prior to 1935; you did not of course? A. No.

Q. Are you aware now of any single instance where this custom that you have testified to with reference to the performance of a contract of the Grays Harbor Exportation Company with that clause in it has been carried out in the manner in which you describe? Can you think of a single one?

A. You mean contracts with the Grays Harbor Exportation Company?

Q. Yes. That is the one that has the clause in it concerning which the custom here is in question.

A. Well, I have had material tendered me with similar clauses.

Q. That is not the question, Mr. Haig.

A. Well, I can't say that the Grays Harbor Exportation Company——

Q. As a matter of fact you don't know now of any instance of custom with reference to the contract that you have in your hand and which you

(Testimony of Neil Haig.)

saw today for the first time, do you? You do not know of any instance of custom with reference to that contract, do you?

A. I know of similar instances.

Q. With reference to contracts of the Grays Harbor Exportation Company?

A. Oh, no; with similar contracts. [81]

Mr. Schweppe: Well, I renew the motion to strike.

The Court: The motion is denied.

Q. (By Mr. Schweppe) You do not now have any present knowledge of any instance of customary performance with reference to any contract of the Grays Harbor Exportation Company having that clause in it, do you? A. No.

Mr. Schweppe: That is all.

Mr. McCurtain: I think, while we are on the subject with this identical witness, Your Honor, I will make another offer.

Redirect Examination

By Mr. McCurtain:

Q. I will hand you a blank contract, having across the face of it "Douglas Fir Exploitation & Export Company," which has been marked by the clerk of this court as Plaintiff's Exhibit 12 in this case for identification, and will ask you to read and study the general conditions printed in that form of contract, and state to the court—well, first I will have you read it and then I will interrogate you.

A. Yes, I am familiar with this clause.

(Testimony of Neil Haig.)

Q. You are familiar with that clause? Is that the same clause that was used and the same form of contract that was used on C. I. F. shipments by Douglas Fir for the number of years you were with them? A. Yes. This was a similar clause.

Mr. McCurtain: Now, if Your Honor please, I will say to Your Honor and to counsel that the only distinction between this clause and a verbatim copy of the [82] clause of the contract in suit, it is a verbatim copy of this with one exception only. The word "war" is not included in the general specifications—there are some eighteen general causes—and in one instance they use an expression "their" instead of "the seller." So that I say to Your Honor as a member of the Bar that the clause is identical in all respects, word for word and comma by comma, and i-dotting and t-crossing with the contract in suit, with that one exception; and I offer to prove by the witness that there was a custom and usage established in this particular locality over a long period of years using this identical contract with that one exception, which I argue to Your Honor entitles me to interrogate the witness concerning this and the custom under it; because I say in all sincerity to Your Honor that the elimination of that one word "war" has nothing to do with the construction of it on strikes whatsoever, and I offer this exhibit in evidence with that explanation of it.

Mr. Schweppe: I object to the introduction of this exhibit in evidence on various grounds. The first is

(Testimony of Neil Haig.)

that testimony of custom with reference to a contract by another contract is entirely incompetent, irrelevant and immaterial, being transactions between other persons and customs with reference to business done by some one else.

I next object to it on the ground that—and I have not had a chance to study it in detail—but to the extent that the language of that contract varies from the contract here in question, of course the testimony as to custom with reference to this contract would not be admissible here. [83]

In the third place, I object to it upon the ground that this again is an attempt to violate the parol evidence rule by evidence of custom.

And finally, I object to it upon the ground that there is no evidence as yet as to when this contract was in use by the Douglas Fir Exploitation Company, whether this year, last year, or the year before, or five years ago, which would have a material bearing upon the testimony of this witness as to whether or not any evidence concerning this contract by this witness is admissible in evidence. Personally I do not know.

Your Honor agrees with the theory that the evidence of custom is admissible only to the extent that it may be admissible to show what the particular parties contracted with reference to it. He is testifying with reference to a custom about another agreement with another company. It seems to me that unless it is established that the custom with reference to this agreement was a general custom

(Testimony of Neil Haig.)
which all of the parties knew, it would not be admissible in evidence. I therefore make the objection that it is incompetent, irrelevant and immaterial for the specific reasons that I have given. It is a contract between other persons.

Mr. McCurtain: I only expect the exhibit to be used, if Your Honor permits it to be introduced, for the purpose of testimony concerning the one clause.

The Court: Concerning the custom with reference to it?

Mr. McCurtain: With reference to this one clause.

The Court: It is offered upon that condition? [84]

Mr. McCurtain: It is offered on that condition, that there is no single change at all in the general text; and the only difference is that "war" has been inserted in the defendant's contract, and war is not inserted in the general conditions clause here; and that in all other respects save that, and that is this contract the language is "beyond their control," whereas in the contract in suit the language is "beyond the seller's control," they have substituted "seller's" for "their", and left "war" out; so that to all intents and purposes it is an identical contract.

The Court: Does this contract refer to buyer and seller?

Mr. McCurtain: Yes, this refers to buyer and seller, and they use the expression "their" instead

(Testimony of Neil Haig.)

of "seller"; but "their" and "seller" of course are synonymous as far as the contracts are concerned. I offer it for the purpose of showing—and I want to call attention to one mistake I think Mr. Schweppe made in his argument—the witness did testify as I understood him—I am sure I am right on that—that this is the form used by this company for the many years he was with it.

The Court: That is about what he testified to.

Mr. McCurtain: In substance he said that.

The Court: I do not recall whether he was with the company during the time that the defendant's contract was outstanding or supposed to be in effect, or not.

Q. (By Mr. McCurtain) What years were you with this Douglas fir?

A. I left Douglas Fir the 15th of February, 1936. [85]

Q. And this contract, as I understand it, this form of contract with this general conditions clause, was in effect for a period of years prior to that?

A. It was in existence at the stevedore strike, the big strike.

The Court: Of '36 and '37?

The Witness: No, the one prior to that.

Mr. McCurtain: 1934.

The Court: What about 1936 and '37? Do you know whether or not it was in effect at that time, used generally at that time by the trade?

The Witness: That contract would be used generally at that time.

(Testimony of Neil Haig.)

Mr. McCurtain: I will undertake to show, Your Honor, that the contract was in use during all of the time, and it is in use now.

Recross Examination

By Mr. Schweppe:

Q. May I ask one question? Isn't it a fact, Mr. Haig, that this form of contract of the Douglas Fir Exploitation Company grew out of the big stevedore strike of '34? A. No, I don't think so.

Q. You don't think so. A. No.

The Court: The court will suspend ruling upon the admission of that exhibit in evidence, but the court will rule that you may inquire of him at this time with reference to the custom of the trade in construing that particular phrase contained in Exhibit 12. [86]

Redirect Examination

By Mr. McCurtain:

Q. Now, Mr. Haig, remembering that that contract that I have in my hand is Exhibit 12, I will ask you to state whether there was and is a custom concerning shipments under this clause in the contract, Exhibit 12, a general custom in the trade over a period of years where performance has been delayed by strike or other cause mentioned in this general clause, whether there is or is not such a general custom?

(Testimony of Neil Haig.)

A. There is a general custom under that clause.

Q. And what is your testimony as to what that general custom is?

A. The contracts were filled after the strike, after the strike was over, were filled in a reasonable time.

Mr. McCurtain: You may cross examine.

The Court: Do you offer it now after the witness has testified?

Mr. McCurtain: Now I offer that contract in evidence.

Mr. Schweppe: I make the same objection, if the court please.

The Court: The objection is overruled. The court admits that Plaintiff's Exhibit 12 to characterize and illustrate this witness' testimony, to show what the testimony was with reference to.

(Plaintiff's Exhibit 12, contract, admitted in evidence.) [87]

(Part of
PLAINTIFF'S EXHIBIT 12)

Douglas Fir Exploitation and Export Co.

MEMORANDUM OF AGREEMENT

L. General Conditions:

All conditions of Export Schedule..............., whether or not before enumerated, to be mutually binding on Buyer and Seller.

Delivery and/or shipment of material under this contract, is subject to acts, requests, or commands

(Testimony of Neil Haig.)

of the Government of the United States of America in time of war or national emergency and Sellers are not liable for delay or non-shipment, or for delay or non-delivery, if occasioned by acts of God, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, droughts, strikes, lockouts, or labor disturbances, quarantine, or non-arrival at its due date at loading port of any ship named by the Sellers or from any other cause whatsoever, whether or not before enumerated, beyond their control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of ladings, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by Sellers, provided delay does not exceed 30 days. The conditions of usual Charter Party and/or Bills of Lading are hereby accepted by the Buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

Should the ship named to carry lumber under this contract be lost, then the Sellers are to have the option of substituting another ship or ships within 30 days after the period named above, or of cancelling this contract. Goods to be shipped under and/or on deck at Seller's option. [200]

(Testimony of Neil Haig.)

Recross Examination

By Mr. Schweppe:

Q. Now, Mr. Haig, did the Douglas Fir Exploitation Company make any C. I. F. contracts with shippers in the Orient? A. Yes.

Q. Isn't it a fact that most of the shipments made by Douglas Fir Exploitation Company were simply cost and not freight during the time you were with that company?

A. Not in the department I was in. Mine was purely C. I. F., or cost and freight.

Q. Isn't it a fact the major business of the Douglas Fir Exploitation Company was cost and not freight?

A. You mean were F. A. S. sales?

Q. F. A. S. sales, free alongside ship, without any commitment as to the freight contract?

A. Yes, the major portion of the business.

Q. Yes; now, when you were testifying as to custom that you believe to exist with reference to Plaintiff's Exhibit 12, what you are testifying to, I take it, is what the Grays Harbor Exportation Company did pursuant to that contract in one or more instances that you know about, isn't that right?

The Court: You mean Douglas Fir?

Q. (By Mr. Schweppe) Douglas Fir Exploitation Company I mean?

A. Well, I am referring to the particular—when I take that clause, I am referring in particular to

(Testimony of Neil Haig.)

the contracts that were delayed during the big stevedore strike and were afterwards completed.

Q. They were afterwards completed, and your testimony is [88] based entirely upon the fact that the Douglas Fir Exploitation Company, after what you call the big strike, which was the longshoremen's strike of 1934, did complete some of those contracts? A. Completed them all.

Q. All right, completed them all; and your testimony is based entirely on that fact?

A. That is it.

Q. In other words, your testimony is based on the fact that that is what that company did?

A. What it has been customary to do.

Q. That is what they did, isn't that right? Isn't that the whole basis of your testimony, that you think it was a custom to do it under that contract, that that is what that company did after the big strike? A. It was a custom.

Q. I did not ask you that. I said, you are basing your testimony upon the fact that that is what that company did after the big strike?

A. That is what they did.

Q. Is it your idea, Mr. Haig, that after the contract period has expired, having a clause in it such as the one you refer to, that the buyer must accept the merchandise?

A. The buyer is generally anxious to accept.

Q. Well, you did not answer my question, whether he must legally accept it on a falling market.

(Testimony of Neil Haig.)

Mr. McCurtain: I think, if Your Honor please, that calls for a legal opinion of the witness. He is testifying what the custom is.

The Court: Well, it is cross examination. [89]

Mr. McCurtain: Now he is asking him what he thinks the legal liability is under the contract.

The Court: It is cross examination. The objection is overruled.

Q. (By Mr. Schweppe) Mr. Haig, you have been in this business a long time you say. If you have a contract with some buyer in the Orient that calls for half a million feet for November shipment, the contract containing a clause such as this Douglas Fir Exploitation Company contract that you have identified, is it your idea that if a strike supervenes throughout the month of November and ends let us say the first of January, that the buyer has to take that shipment, even though the market is falling, on the first of January? Is that your idea of what the custom is?

A. In my experience, in the majority of the cases, they have taken it.

Q. Well, that does not answer the question. I am exploring the extent of this custom. You say it is the custom that the shipper must ship. Now, I ask you whether it is the custom that the buyer must take after the contract period has expired? In other words, can the buyer come to me and say, "Well, you did not ship that during November; I took it on the basis of prevailing mercantile prices

(Testimony of Neil Haig.)

during that month. I do not want it in January, because I can buy it cheaper somewhere else." It is not your idea that he has to take it after the time of the contract has expired, is it?

A. If the thing was delayed, you would tell him about it. He might elect to take it, and he might not. [90]

Q. Would he have to take it in your opinion under this custom that you speak about? He would not have to, would he? You know from experience that he does not, isn't that it?

A. No, I don't. I know of cases where they have taken it, and I know of cases where they have not taken it. In Great Britain they wouldn't take it.

Q. Then you would not say that it was customary, that it is part of this custom that the buyer has to take, would you?

A. I still think he has got to take it.

Q. You still do? That is your opinion about it? What about the custom that you have reference to? Now, isn't it a fact, Mr. Haig,—let's get down to the practical manner of doing business—isn't it a fact that whenever the contract period specifically stipulated by the parties has expired, that you call up the other party and make a new engagement with reference to that shipment, isn't that right? You call them up about it after the contract has expired? You find out if they still want it, isn't that what you do?

A. Yes, in substance that is what you do.

(Testimony of Neil Haig.)

Q. Yes. In other words, although the contract period has expired, you make a new agreement with reference to the taking of that shipment after the contract is over?

A. You generally make it before the contract period expires.

Q. You make a new agreement, do you not, for shipment after the contract period? A. Yes.

Mr. Schweppe: That is all. [91]

Mr. McCurtain: That is all, Mr. Haig.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Force.

L. E. FORCE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Will you please state your full name?

A. L. E. Force.

Q. What is your business, Mr. Force?

A. I am president and general manager of the Douglas Fir Export Company.

Q. For how long have you occupied that or had that position with this corporation?

A. I have been general manager since 1928, and president for the last five years.

(Testimony of L. E. Force.)

Q. What previous experience have you had prior to 1928 in the export business of lumber?

A. I have been with this present company since 1919.

Q. And had you any experience prior to that time in this line?

A. For about eight or ten years prior to that I was with the exporting firm of Hind-Rolph & Company in San Francisco.

Q. Are you familiar with the clause which I show you on Plaintiff's Exhibit 2, the contract used by the Grays Harbor Exportation Company, the general conditions?

A. I can say I am not familiar with it because I have never seen it.

Q. Will you examine it please, Mr. Force? [92]

A. I don't know whether I can without my glasses.

Q. I can give you, with the court's permission, a copy that is in large print.

Mr. McCurtain: Will the court permit me to give the witness this one?

The Court: If opposing counsel does not object, the court does not.

Mr. Schweppe: I have no objection. You say that that is an identical copy of it?

Mr. McCurtain: Yes.

Mr. Schweppe: All right.

Mr. McCurtain: May I state to the court and for the record that the copy I now hand the witness is a verbatim copy of the clause?

(Testimony of L. E. Force.)

Mr. Schweppe: Of the general conditions that are set forth in Plaintiff's Exhibit 2?

Mr. McCurtain: Yes. Plaintiff's Exhibit 2 and all the others.

The Court: The witness seems to have finished reading the copy.

Q. (By Mr. McCurtain) Are you familiar with that language now, Mr. Force?

A. I would say that it is very similar to one that is used by us, but I would not say that it is verbatim.

Q. I hand you now, Mr. Force, Plaintiff's Exhibit 12, which you of course will identify as one furnished by you; and I say to you that that contract is word for word with the contract that you have just examined, with this exception: That in the contract Exhibit No. 12 the word "war" is not included in the general exception clause, and that there has been a change in the expression [93] "beyond their control," this one reading "beyond the seller's control"; and with the exception of those two words, there is no variance in the contracts whatsoever.

A. You are telling me there isn't?

Q. I am telling you there is not, and you may for the purpose of your testimony rely upon that. Now, I ask you to state, Mr. Force, whether this clause in Exhibit 12, being your contract, has been in general use in this community for sales C. I. F., and if so for how many years?

(Testimony of L. E. Force.)

A. I can only say as to its use by our own company.

Q. How long has that form been used by your company for C. I. F. shipments?

A. Since 1924.

Q. Now, during that fourteen years, Mr. Force, has a custom grown up, or is there a custom as to the obligation of the seller to deliver subsequent to the time fixed for the delivery by the contract when such timely delivery has been delayed because of a strike or other causes mentioned in the clause?

A. I would not want to say that there is a recognized custom. I know what we do.

Q. What has your company done over the fourteen year period you have been using it?

Mr. Schweppe: I object to any testimony unless the testimony is to custom.

The Court: That objection is sustained in view of the witness' preceding statement.

Mr. McCurtain: I would like to ask one more question of the witness.

The Court: You may do so. [94]

Q. (By Mr. McCurtain) How many mills, Mr. Force, does your organization sell the output of, of how many mills in the northwest?

A. We sell the export production, or that proportion of their production that goes to export, of seventy mills located in the States of Oregon and Washington.

Mr. McCurtain: Now I suggest to Your Honor

(Testimony of L. E. Force.)

that that is sufficient to establish a custom in this vicinity.

The Court: Well, I cannot accept that as being conclusively determined. You may inquire of the witness further along any proper line that you may think advisable.

Mr. McCurtain: No, I only expect to be able to show by this witness, Your Honor, as to the experience of this company selling for these seventy mills; and he is not prepared to testify further than that. I should like, however, to again offer, Your Honor, to prove the common custom or general usage under this and similar contracts, which is in line with Your Honor's former refusal.

The Court: The matter as already restricted will have to stand. This witness, like the other one, may be permitted to state what the custom is.

Mr. McCurtain: I respect Your Honor's ruling on the matter, but I simply want to make my record clear on that.

The Court: Objection sustained.

Mr. McCurtain: That is all, Mr. Force.

Cross Examination

By Mr. Schweppe:

Q. Mr. Force, how long did you say you had been the execu- [95] tive head of the Douglas Fir Export Company?

A. I have been general manager since 1928.

Q. You were general manager at the time, or a considerable portion of the time when the last wit-

(Testimony of L. E. Force.)

ness who was on the stand, Mr. Neil Haig, was employed by your company? A. Yes.

Q. You were the general manager?

A. From 1928 on, yes.

Q. You are not aware of any custom with reference to the performance of the contract of the Grays Harbor Exportation Company, the defendant here, are you? A. No, sir.

Mr. Schweppe: That is all, Mr. Force.

(Witness Excused.)

Mr. McCurtain: I will call Mr. Dant.

CHARLES E. DANT,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is Charles E. Dant?

A. Yes, sir.

Q. What relation do you bear to the plaintiff, Mr. Dant?

A. Well, I am president of Dant & Russell.

Q. What experience have you had and over what period of years in the exporting of lumber and other products generally from the Pacific Coast and elsewhere?

A. Well, we got into the export business about 1908, and have been in it actively ever since.

(Testimony of Charles E. Dant.)

Q. I will ask you to examine the language used as shown by plain- [96] tiff's Exhibit 1, and call your attention particularly to the general conditions clause in the contract attached as a part of that exhibit? A. I am familiar with this.

The Court: You have read it over many times and know what he is asking about?

The Witness: I have read it over several times, yes.

Q. (By Mr. McCurtain) I also hand you Plaintiff's Exhibit 12 for identification—I believe that was introduced, Your Honor?

The Court: It was. It was received in evidence.

Mr. Schweppe: Solely as illustrative of the witness' testimony as I recall.

The Court: Yes, to illustrate that witness' testimony.

The Witness: Yes, I read this over last night.

Q. (By Mr. McCurtain) You have studied this also, and you know of the difference between this contract and the other one, the exact wording?

A. It is identical excepting that word "war" I think.

Q. Now, Mr. Dant, I will ask you whether there is a general custom and usage in the trade concerning the performance or obligation to perform contracts containing the clauses to which I have just directed your attention, where delivery on the date specified in the contract is rendered impossible by reason of strikes or other impediments mentioned there? A. Yes.

(Testimony of Charles E. Dant.)

Mr. Schweppe: I object to the question, if the [97] court please, renewing first the objection on the ground of the parol evidence rule, and secondly the question is not limited solely to the contract of the Grays Harbor Exportation Company.

Mr. McCurtain: Well, I will separate that if Your Honor prefers.

The Court: Yes.

Mr. McCurtain: I asked him as to the two.

The Court: Do that.

Q. (By Mr. McCurtain) I will ask you first, Mr. Dant, then, whether you are familiar with or whether there is in fact a general custom and usage concerning the language under the general conditions clause of what I showed you as Exhibit 1, being the Grays Harbor contract in suit, as to the fulfillment of shipments delayed or rendered impossible because of a strike or other impediment mentioned in the general clause of that contract?

A. Yes.

Mr. Schweppe: I make the same objection, if the court please, on the ground of the parol evidence rule.

The Court: The objection is overruled.

A. Yes.

Q. Will you now state what that custom is please?

A. Well, there is a general custom on the Pacific Coast and all over the world that in the case of strikes or other impediments which delay a ship-

(Testimony of Charles E. Dant.)
ment, that that shipment will be made within a reasonable length of time after those difficulties are removed.

Mr. Schweppe: If the court please, I now move to strike the answer upon the ground that the answer [98] plainly indicates that it is not testimony as to custom with reference to this particular clause.

The Court: Either counsel may inquire for more specific detail of the witness. The witness' answer will stand.

Q. (By Mr. McCurtain) Now I ask you, Mr. Dant, whether there is a custom generally understood and known to the trade and usage covering shipments delayed under the clause as shown by Exhibit 12, namely the Douglas Fir clause where such shipments are delayed beyond the date specified for performance in the contract because of strikes or other impediments specified in the general clause?

Mr. Schweppe: Do you mean the Grays Harbor or Douglas Fir?

Mr. McCurtain: I am speaking now of the Douglas Fir. He answered about the Grays Harbor.

Mr. Schweppe: I make the same objection that the answer would be incompetent, irrelevant and immaterial, evidence of custom with reference to another contract between other contracting parties.

The Court: Read the question please, Mr. Reporter.

(Testimony of Charles E. Dant.)

(The question was read by the reporter.)

The Court: The objection is overruled.

Q. (By Mr. McCurtain) Will you answer, Mr. Dant? A. Yes, there is a general custom.

Q. Now, state what that *question* is.

A. Well, that custom would be to ship within a reasonable length of time, as soon as possible within a reasonable length of time. [99]

Q. And is there any measure as to any reasonableness of that time which is generally understood in the trade?

A. It depends on conditions. It might be that space would be available immediately, or it might be a month or two months or three months; and I would say that we have sometimes had much longer than that.

Q. Now, have you had actual experience there under either or both of these particular contracts concerning which I have interrogated you other than the instance in suit?

A. We have had actual experience, yes.

Q. And what has been that actual experience?

A. Well, usually—the question is confusing. The question never came up with anybody. They always ship. It never came up with the Douglas Fir, and we never expected it to come up with the Grays Harbor Exportation Company.

Q. Have you purchased during the last twelve or fourteen months from Douglas Fir any considerable quantity of timber or logs or lumber under their C. I. F. contract which is the one here?

(Testimony of Charles E. Dant.)

A. No, not under the C. I. F. contract.

Q. Not under this contract?

A. But I purchased many millions of dollars worth from them where we arranged the freight ourselves.

Mr. McCurtain: That I think that should be stricken, Your Honor.

Mr. Schweppe: I move to strike that.

The Court: It may be stricken.

Mr. McCurtain: I think that should be stricken.

Q. (By Mr. McCurtain) What do you say, Mr. Dant, as to whether the custom concerning which you have testified, [100] and as affecting both these contracts as shown by these exhibits, is generally known and understood throughout the trade, throughout the world or the Pacific Coast?

Mr. Schweppe: I make the same objection.

The Court: Overruled. Read the question please.

(The question was read by the reporter.)

A. Yes, it is generally known with everybody in the trade.

Q. Did you have, Mr. Dant, or did your firm to your knowledge have any contracts with the Grays Harbor in which this clause was used other than the present case, or those where lumber was shipped to Hong Kong? A. Yes.

Q. What were those contracts?

A. Well, they were some contracts for lumber which they shipped.

(Testimony of Charles E. Dant.)

Q. Well, are you not now referring, Mr. Dant, to those that were introduced in evidence this morning? A. Yes.

Q. Did you have any others than those?

A. We have had a good many of them.

Q. To your knowledge was any information furnished to you or any of the employees of your firm, concerning the question of whether the Grays Harbor would ship under these contracts, prior to approximately March 6 or 7?

A. That was the date we were up here?

Q. No. That is the date when the letter came in asking the eighty seven and a half cent increase.

A. We had no knowledge before that.

Mr. McCurtain: You may inquire. [101]

Cross Examination

By Mr. Schweppe:

Q. That is, you mean by that last answer that you had no knowledge of it?

A. No, I had no knowledge.

Q. You do not know what knowledge anybody in your organization had?

A. I was watching it very closely.

Q. What you are testifying to at the moment is what you knew about it?

A. What I knew, yes.

Q. Do you recall, Mr. Dant, seeing the contract form which is Plaintiff's Exhibit 1, the one you said you had read a number of times, prior to 1935?

(Testimony of Charles E. Dant.)

A. Have I seen the Grays Harbor form?

Q. Yes. Do you know whether the Grays Harbor had that form prior to 1935?

A. I don't know, no.

Q. You do not recollect seeing it prior to that time, do you? A. No.

Q. Now, to your knowledge the first time any question has arisen under the general conditions of this contract, which is Plaintiff's Exhibit 1, is by reason of the existence of the longshore strike of 1936 and '37, isn't that right?

A. What is that question?

(The question was read by the reporter.)

A. You mean that the first time that we had occasion to go into this matter? [102]

Q. That is right.

A. Yes, was when they refuse to ship.

Q. That is the first time you knew of any issue arising about it?

A. Yes, that is about the first time.

Q. Mr. Dant, having in mind your evidence as to the custom of the shipper's obligation to ship after the contract period specified in the contract has expired, is it also a part of this custom, according to your conception, that the buyer must take after the contract has expired?

A. No, sir. He does not have to.

Q. The buyer does not have to take?

A. Not if his contract has run out. He usually does take.

(Testimony of Charles E. Dant.)

Q. If the time has run out, he does not have to take? A. No.

Mr. Schweppe: That is all, Mr. Dant.

Mr. McCurtain: I want to be clear that that is in the record, Your Honor.

Redirect Examination

By Mr. McCurtain:

Q. To sum up the situation, it is your contention as a matter of custom with relation to this contract, and other similar contracts, that the buyer has a certain option which is not accorded to the seller? A. Yes, sir.

Mr. McCurtain: Now, if Your Honor please, I hope you will not misunderstand me. I mean to show the court every deference in its ruling, and I know the sincerity of the court; but I would like to have this witness answer a general question, which I know in advance Your [103] Honor will overrule in accordance with your previous ruling; but in order that I may be sure my record is entirely clear on it, I should like to ask Mr. Dant this question, whether it is a custom generally in the export trade that clauses such as the clauses disclosed by Plaintiff's Exhibits Nos. 1 and 12, and providing generally that the deliveries are subject to and conditioned upon no liability against the seller by reason of the acts enumerated in those and similar clauses, where the strict performance at the time specified in the contract is pre-

(Testimony of Charles E. Dant.)

vented or rendered impossible by reason of strike or other enumerated causes, whether it is not under such contracts a general trade custom and practice well-known and understood throughout the trade generally, not only in the northwest but on the Pacific Coast and throughout the World, that such clauses, whatever may be their particular wording, are generally under the custom construed to mean that the seller is obligated to deliver within a reasonable time after the removal of the impediment or the cessation of the strike, if that be the cause.

Mr. Schweppe: I make the same objection that I previously made, if the Court please.

The Court: That objection is sustained.

Mr. McCurtain: I understand, Your Honor, and I would like an exception.

The Court: Exception allowed.

Mr. McCurtain: That is all, Mr. Dant.

Recross Examination

By Mr. Schweppe:

Q. I might ask you one question. Isn't it a fact with [104] respect to the lumber involved in these particular shipments, that Dant & Russell resold to the Orient without a comparable clause in the sales contract? Isn't that right?

A. No one would buy from us if we—we have a clause all right, but it would be—if we took the same stand that——

(Testimony of Charles E. Dant.)

Q. (interposing) You do not have a clause like this in your contract?

A. We have a very similar clause, yes; but our clause is a little clearer. It is a little clearer. It was copied from the United States Steel Corporation, and it is a little fuller.

Q. I have no objection to your going into that, but what I am trying to find out is whether or not in the contracts of shipment that you had with the Orient, with respect to the buyers in the Orient and with respect to the subject matter of these unfilled contracts, you sold with or without a clause protecting you in the event of inability to obtain delivery by reason of strike or other cause over which you had no control?

A. We were fully protected.

Mr. Schweppe: That is all.

(Witness Excused.)

The Court: At this time we will take a five minute recess.

(Recess)

Mr. McCurtain: I should like, Your Honor, to call Mr. Herber, the defendant, to the stand. [105]

J. P. HERBER,

called as an adverse witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. Your name is J. P. Herber?

A. Yes, sir.

Q. What relation do you bear, Mr. Herber, to the defendant in this case, the Grays Harbor Exportation Company?

A. I am the general manager.

Q. And have been for a period of years?

A. I have been for several years, yes, sir.

Q. Now, I direct your attention, Mr. Herber, to the clause of your contract, the contract of your company, bearing your signature, and which is attached as a part of Plaintiff's Exhibit 1; and I direct your attention to the general conditions clause, with which of course I assume you are entirely familiar? A. Yes, sir.

Q. Please state to the court whether it is a fact that you had at the time of the occurrence of the strike, the longshoremen's strike in 1936, several contracts with concerns other than the plaintiff, which contracts called for C. I. F. shipment delivery by you, at a fixed contract price with specified delivery dates of lumber or logs, which contracts were evidenced by contracts in all respects identical with the exhibit you have just examined, except for the names and amounts and so forth;

(Testimony of J. P. Herber.)
that is to say the general conditions clause was used?

Mr. Schweppe: I object to this testimony as to contracts with concerns other than the plaintiff, on [106] the ground it is incompetent, irrelevant and immaterial, contracts between other parties, and having no bearing on the issues here.

Mr. McCurtain: In fairness to the court, I want to state the purpose of the inquiry. I propose to show, if permitted, by the witness, that the defendant concern did have contracts identical in all respects insofar as the clause in controversy here is concerned, with others; and did fulfill those contracts at the contract price, the periods running several months after the cessation of the strike; for the purpose of showing a construction of the contract in suit by the defendant concern itself. I profess, Your Honor, that it may seem a novel way of getting at it, but I want to offer to prove that by this witness, the general manager of the company.

Mr. Schweppe: If the court please, I sensed perhaps that that was the purpose for which counsel was going to offer this evidence, and I will specify the objection a little further on this ground, and that is this: The rule which counsel invokes as to the construction of the parties to a contract, that is, the practical construction is a rule, as I read the authorities, confined to the practical construction by the parties themselves, based either

(Testimony of J. P. Herber.)

on that contract or upon a prior contract between the same parties having the same language in it. Frankly there may be a case on the subject, but I have been unable to find any case where what one contracting party does with reference to a third person not a party to the controversy, where other considerations might be operative, has any bearing upon the [107] practical construction of the parties; because the practical construction rule is not the construction of one party; it is the practical construction by both parties, because a construction by one party not assented to by the other party is not within the rule. I therefore renew the objection on the ground that the attempt here is to show contracts between the defendant and third persons, those contracts not being in any particular in issue here.

The Court: Do you wish to call the court's attention to any authorities?

Mr. McCurtain: Counsel has very correctly stated the purpose and intent of the question, and I must confess to Your Honor that I did not have a case directly in point.

The Court: What the parties did with reference to this contract between themselves might be admissible; but what one of the parties did with some other person with reference to some other contract would not be admissible. For that reason I sustain the objection.

(Testimony of J. P. Herber.)

Mr. McCurtain: Very well, Your Honor. With that we rest.

The Court: Do you wish to inquire?

Mr. Schweppe: You rest?

The Court: Plaintiff rests.

Mr. Schweppe: I might just as well continue Mr. Herber on the stand as the first witness for the defense.

The Court: You are then calling Mr. Herber as defendant's first witness?

Mr. Schweppe: I will call Mr. Herber as defendant's [108] first witness.

J. P. HERBER,

recalled as a witness on behalf of the defendant, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Handing you, Mr. Herber, Plaintiff's Exhibit 1, in which is included a contract form of the Grays Harbor Exportation Company, that happening to be a contract with Dant & Russell, Inc., and calling your particular attention to the form of that contract and the printed provisions thereon, I ask you, Mr. Herber, how long the Grays Harbor Exportation Company has been using that form of contract?

(Testimony of J. P. Herber.)

A. Immediately following the longshoremen's strike of 1934.

Q. Will you state whether or not your use of this contract grew out of that strike?

A. It did.

Q. Did you prior to that time have any such clauses, any such general conditions in the contract as are contained here? A. No.

Mr. McCurtain: I object. I would like to move, Your Honor, on the ground that the witness answered before I could make the objection, to strike that last answer.

Mr. Schweppe: I am perfectly willing that the record can be considered as my question just having been stated before the witness' answer, so that he can make his objection.

Mr. McCurtain: I see no competency in that question. What they had before this contract was in use is fairly comparable to the evidence you excluded from my side, Your [109] Honor.

The Court: It seems to me it ought to be excluded, Mr. Schweppe; and it is ordered that that question about what contract provided for, and the answer to it, being "no," shall be stricken. It is so ordered.

Mr. Schweppe: It is not particularly material.

Q. (By Mr. Schweppe) This particular form has been in use since that strike?

A. Yes, sir.

(Testimony of J. P. Herber.)

Q. Not prior thereto? A. That is right.

Q. Now, Mr. Herber, when Mr. Connolly, the Seattle agent of the plaintiff, was on the stand, he testified that he did not have any recollection of having any conversation with you on or about January 11, 1937, with respect to the cancellation of space and your company's position that it would not go forward with the contracts. I ask you, Mr. Herber, whether or not on or about January 11 you called Mr. Connolly to your office and had a conversation with him? A. I did.

Q. What was the substance of that conversation?

A. I advised Mr. Connolly that the steamship companies with whom we had contracts had refused to reinstate their freight contracts, the contracts that had been cancelled earlier; and inasmuch as they refused to reinstate those contracts, we would not be able to reinstate our contracts which were no longer in force after the strike.

Q. You fixed the date of that conversation with Mr. Connolly as January 11, 1937. How do you fix that date, Mr. Herber? [110]

A. I fixed it from the memorandum book in which I keep a record of all calls on my daily transactions. In other words I keep a record of all calls during the day pertaining to business.

Q. In this book which you have handed me, which I will show to counsel—I do not wish to introduce it in evidence—will you describe what this

(Testimony of J. P. Herber.)

memorandum book is? What is that book that I have in my hand, and which I have just showed to Mr. McCurtain for examination, which has a legend on it, "December '36," and some other date in '37?

A. It is a record book, a daily record book that I keep, have been keeping for many years, which I post all calls, all engagements, all inquiries that come in as regards lumber, logs, or space, simply as a matter of record that there will be no one overlooked, that all matters are attended to during the day. We get many calls; and if we didn't keep a record of them as they come in, why we would not be able to keep track of them.

Q. And it is from this memorandum book that you have refreshed your recollection as having had a conversation on the date mentioned with Mr. Connolly? A. Yes, sir.

Q. With reference to the Dant & Russell contracts? A. Yes, sir.

Q. Now, Mr. Herber, some evidence has been attempted to be offered as to what is the custom of the export trade with reference to the general conditions contained in the contract which is part of Plaintiff's Exhibit 1, which a contract of the Grays Harbor Exportation Company. Will you state whether or not there is any custom to the effect [111] that it is the seller's obligation to make delivery under that contract of your company after the specific contract period fixed in the contract has expired? A. I know of no such custom.

(Testimony of J. P. Herber.)

Q. As a matter of fact, Mr. Herber, until the plaintiff in this case in their reply pleaded——

Mr. McCurtain (interrupting) I suspect, Your Honor, that this question is likely to become leading, if counsel continues in his present vein.

The Court: It is quite leading.

Mr. McCurtain: I object to the form of the question if it is continued in that way.

Q. (By Mr. Schweppe) Do you know of any custom with reference to your contract form which I introduced in evidence of the character that I outlined? A. No.

Q. At the time these contracts were entered into between your company and Dant & Russell, Inc., the contracts which are here sued on, did you have in mind any such custom as that which has been suggested here in this court today?

A. I did not.

Q. You did not even know about it?

A. I didn't know about it.

Mr. Schweppe: I think that is all.

Cross Examination

By Mr. McCurtain:

Q. Mr. Herber, I direct your attention to what I believe to be the page you looked at in this record book, and to the fact that under the heading or the date January 11 you have marked "Connolly (D. & R.)", and then there are some [112] hiero-

(Testimony of J. P. Herber.)

glyphics which I do not understand. Is that shorthand or just a check mark? A. Just marks.

Q. Then you mark "D. & R." again. I have read the full note so far as that date is concerned, have I not? A. Yes.

Q. Is there anything in that which suggests to your mind what you talked about on that date?

A. Yes, sir.

Q. What? A. I recall——

Q. (interrupting) No, I am not asking you what you recall. I am asking you what there is in this data, made in your own handwriting, which reads, "Connolly (D. & R.)" and "D. & R.", which suggests to your mind what you talked about?

A. Yes, sir.

Q. What? What is there in the note that directs your attention to any particular conversation?

A. It confirms that I did have a conversation with him, because it is check-marked there.

Q. That I grant you, but is there anything in the book kept by yourself which indicates the subject of that conversaton or what was said at it by either of you?

A. Re Dant & Russell contract. It states "D. & R. contract".

Q. Where do you see anything about contract? That says "D. & R." doesn't it? A. Yes.

Q. This says—I read it again for the sake of the record—the book states, "Connolly; contracts D. & R.", then a check mark indicating you say

(Testimony of J. P. Herber.)

nothing, "D. & R. Inc." [113] Now, I ask you again what there is in that book record that indicates to you what was said by either you or Connolly on that date, if anything?

A. Well, the memorandum in the book is merely confirmation or a reminder that I talked to Mr. Connolly on that date about the Dant & Russell contract situation.

Q. But there is nothing in the note to indicate that?

A. There is nothing there that outsiders could see.

Q. There is nothing to indicate that you might not have talked about a future sale to Tsingtau?

A. The strike was on and there were no future sales being talked about.

Q. The strike was on during that period? Now, is it not true that during that strike period, you talked to Mr. Connolly a number of times?

A. I think we talked to Mr. Connolly three or four times during that October 28 period to February 1.

Q. Can you find any other reference in this book to those conversations, or anything to remind you of the time you talked with him?

A. Yes, I can, if we had the book prior to this book.

Q. Now, does this book contain the February dates, immediately following the month of January?

(Testimony of J. P. Herber.)

A. If my memory serves me right, we had no more conversations with Mr. Connolly until he came into the office with Mr. Dant.

Q. That would be March 18? That would be March 18, when I was there? A. Yes, sir.

Q. That was March 18? [114]

A. And there was Mr. Collins from Shanghai.

Q. Mr. Collins from Shanghai?

A. That is correct.

Q. Now, is it not true, Mr. Herber, that you talked with Joe Connolly, the representative of this plaintiff concern, at least a dozen times?

A. No, that is not correct.

Q. Is it not true that you talked with him several times between February 5 and March 18?

A. Several times.

Q. Have you any record in the book of any of those conversations?

The Court: I believe an undue amount of time is being consumed by the witness in that answer. Can't you ask him some other question?

Mr. McCurtain: I think I can, Your Honor.

A. It may be that Mr. Connolly called at your office, and our conversation was in Mr. Young's office, of which I kept no record.

Q. Mr. Herber, you heard Mr. Connolly's testimony this morning, did you not, that he saw you with considerable frequency, two or three times a week, between February 5 and March 5, which would make several calls? He talked with you, and

(Testimony of J. P. Herber.)

you showed him on one or more occasions copies of telegrams from the Klaveness Line agents, and discussed with him the delay in shipment under these contracts? You heard that testimony, did you not? A. Yes, sir; I heard it.

Q. Do you dispute that you had those conversations that he mentioned? [115]

A. I had one or two conversations with Mr. Connolly, but not two or three conversations during one week.

Q. In the one or two that you had, subsequent to January 11 and prior to March 18, did you at any time mention to Mr. Connolly that you did not expect to perform these contracts?

A. Yes, sir; I did.

Q. What did you say to him about it?

A. I referred back to the conversation I had with Mr. Connolly on January 11.

Q. You considered that January 11 conversation a very important conversation, did you?

A. That was a conversation that we had with regards reinstatement of our contracts that were no longer——

Q. (interrupting) You considered that conversation a very important one, did you not?

A. Yes, sir; Mr. Connolly was Dant & Russell's representative, and I merely advised him what to expect, and asked him to so accordingly advise his Portland people.

Q. You had on three days previous written a long letter to Dant & Russell in which you detailed

(Testimony of J. P. Herber.)

with considerable certainty and detail the reasons that you were not going to fulfill those contracts, did you not?

A. That is a form letter we sent all the shippers.

Mr. McCurtain: I will ask to have the question read, Mr. Reporter, and I would like a yes or no answer.

(The question was read by the reporter.)

A. I did.

Q. Will you give the court the best explanation you can of why you did not send the letter which bears date January [116] 8, and which is shown in Plaintiff's Exhibit 11?

A. This is a form letter, Your Honor, that counsel advised us to send all shippers to Shanghai. Similar letters were addressed to the Robert Dollar Company, H. R. McMillan Export Company, The East Asiatic Company, and were mailed to them on the following day. This particular letter was not mailed.

The Court: Addressed to whom?

A. Addressed to Dant & Russell, Inc., Portland, because I wanted to first consult Mr. J. W. Lewis, the general manager of the Willapa Harbor Lumber Mills, who was furnishing the cargo, with whom the contract was placed, about furnishing cargo if it was agreeable to him to reinstate these contracts at the original contract price. I took the letter with me to Grays Harbor and to Willapa

(Testimony of J. P. Herber.)
Harbor several days later and handed it to Mr. Lewis, and he read it, and he stated as far as they were concerned, the order was cancelled. I put the letter in a folder that I carried papers back and forth to the harbor, and when I got back to Seattle I put that folder in a mailing rack and it lay there several weeks before we discovered it. I called Mr. Schweppe and asked his advice on whether or not it was necessary to mail this letter, since I had a conversation with Mr. Connolly; and he said it was immaterial, under our contract it was not necessary to mail—not absolutely necessary to mail those at this time.

Q. So that is your explanation of why you did not give notice to the plaintiff of your election to cancel the contracts, that you were not certain whether you would do [117] it until you talked to others concerning the freight, is that true?

A. It was not a question of concerning the freight. It was a matter concerning the supplier of the logs, whether or not he was agreeable to reinstating the old contract at the old price.

Q. That is, for the purchase of the logs?

A. Yes.

Q. Well, there were plenty of logs available, were there not, in February, at the old contract price?

A. I wouldn't say there were plenty available. Some were available, yes.

(Testimony of J. P. Herber.)

Q. Several millions of feet, were there not? Many more than enough to fill this contract were available, were they not?

A. I can't say that.

Q. Do you deny that?

A. I can only say as far as our own supply is concerned. We don't buy logs in the open market.

Q. Did you seek to buy them in the open market? A. No.

Q. Now, you considered this matter of cancellation of grave importance, and had been advised by your counsel as to the sending of letters, and you had written a letter to this plaintiff and had carried it back and forth with you to Grays Harbor several times, had you not?

A. No, I didn't carry it back to Grays Harbor several times, just once. I took it down there and consulted Mr. Lewis on the log question, and brought it back with me; and I inadvertently placed it in a file instead of the [118] outgoing mail.

Q. And you thought you had mailed it?

A. I thought I had mailed it.

Q. Then why did you call Mr. Connolly over on the 11th to tell him you were going to cancel the contracts if you had already notified the plaintiff in writing?

A. When I spoke to Mr. Connolly, I didn't know the letter was in my possession.

(Testimony of J. P. Herber.)

Q. No, you thought you had mailed it. That is why I asked you why, if you thought you had mailed this letter of explanation cancelling the contracts under the advice of our counsel, you thought it necessary to make an oral conversation with the local agent of Dant & Russell on the same subject?

A. I didn't get your question.

Q. I will repeat it. You have just stated under your oath to this court that you believed this letter had been mailed as of approximately January 8th, 9th or 10th, and that you had inadvertently left it in your file and had not mailed it, that is true, is it not?

A. To be frank with you, the letter was written on the 8th, and that was on Friday. I did not proceed to Willapa Harbor until the following week, or after my conversation with Mr. Connolly.

Q. Well, now, you had in mind the sending of the letter, and that was of prime importance, was it not, in your mind, sufficiently so at least that you talked to your counsel and associates and your log supply. Why, then, having reduced it to writing, would you give the oral statement to a local representative instead of sending [119] it in to the home office?

A. I say I gave the advice to Mr. Connolly, who was the representative of Dant & Russell, with whom the deal had been concluded.

Q. After having written a letter?

A. After having dictated a letter, but not hav-

(Testimony of J. P. Herber.)

ing submitted it at that time to Mr. Lewis. The following week I proceeded to Willapa Harbor.

Q. And then you did submit the letter to Mr. Lewis?

A. I submitted the letter to Mr. Lewis.

Q. And what did Mr. Lewis have to do with it?

A. Mr. Lewis stated that as far as they were concerned, this contract was cancelled.

Q. What relation is he to your company?

A. We are their export representative.

Q. And he is the logger who supplies you with the logs?

A. He is the logger that supplies us with the logs.

Q. So that then the contracts were to be cancelled because of the log supply, and not on account of the delay of the strike, is that so?

A. Not necessarily, no.

Q. Well, is it partially so?

A. Partially so, yes.

Q. The fact is that you now tell the court, as I understand you, that the reason you did not perform under the contracts was because your log supply failed you, is that correct?

A. That is not entirely correct.

Q. Well, how far is it correct?

A. The only reason I consulted Mr. Lewis in the matter was [120] that I wanted to see what disposition he had made of the logs that he had on hand.

(Testimony of J. P. Herber.)

Q. And he told you that he had already sold them to somebody else?

A. He told us that it was not necessary, he would not conclude this contract two or three months hence. At that time it was still indefinite as to just when the strike would be settled.

Q. And then did you seek a supply elsewhere?

A. I intended to mail the letter when I returned to Seattle and I failed to do so inadvertently.

Q. And that would have been on the 12th or 13th perhaps? A. It was a week later.

Q. Now, do you recall the date when I came with Mr. Dant and Mr. Collins from Shanghai to your office from Portland, to your office in Seattle, and we discussed the matter?

A. Yes, I do.

Q. Do you recall me asking you or your counsel at that time if you intended to repudiate the contracts to please say so in writing?

A. I can't recall.

Q. Isn't it a fact, Mr. Herber, and do you not now recall that at that conversation in your office on March 18, 1937, both Mr. Dant of my client concern, and myself, pressed you to say whether you were repudiating these contracts, whether you were refusing to perform these contracts, and asked you to call in your stenographer if you did not intend to do so and so state in writing, and you refused to so state? [121] A. I refused, yes.

(Testimony of J. P. Herber.)

Q. So that on March 18, two or three weeks after you had made the so-called February shipment, you still refused to confirm in writing your refusal to make good under the contracts, did you not?

A. I felt it was unnecessary. The contracts stood on their own merits. The buyers had been advised that we could not reinstate them.

Q. The only advice we had had up to that date was the advice you gave orally, you say, on January 11, to Mr. Connolly? I call your attention, Mr. Herber, to a letter sent you on February 25, which would be some twenty days after the strike had ceased, over the signature of Mr. Darling, the vice president and executive manager of my client concern, and direct your attention to the language of the letter in which it states—by the way, to be fair with you, this answers your letter of February 24, in which you advised Dant & Russell that you now had on the line for shipment 4609-4 our CX549, and also contracts our numbers CX2813 and 14 and 2858, which were due October and November of the previous year. Do you recall writing that letter? Obviously you do. You knew of its going out, didn't you? A. I assume so.

Q. You assume that you did, and Mr. Sanborn had authority to write it, did he not?

A. Yes, sir.

Q. And you were familiar with his work?

A. Yes.

(Testimony of J. P. Herber.)

Q. And had charge of the office? [122]

A. Yes.

Q. I now direct your attention to your answer under date of February 25, in which we ask you to advise us about number 510, which was due about four months before the strike ended. Do you recall receiving that letter?

A. This letter concerns a space contract and not a square contract.

Q. All right, I direct your attention to the particular language: "You might also inform us as to our order CX510 covering 500,000 feet hemlock logs for Shanghai." Do you recall receiving that letter?

A. Yes, sir; I recall receiving it.

Q. Why didn't you answer it?

A. Would you please clarify just which order that covers?

Q. Yes, I would be happy to do so. CX510, your order number 4566, both mentioned in that letter, refer to a shipment of one million, 500,000 still undelivered, to Shanghai, for October-November and November-December, your option. There is the contract, Exhibit 2.

A. The contract was no longer in force.

Q. Why didn't you so state in answer to that business inquiry from the purchaser when he asked for information about it? Did you consider it of no importance?

(Testimony of J. P. Herber.)

A. We simply were advised by counsel that it was not necessary to answer the letter.

Q. Do you mean to tell me that you, after having——

Mr. Schweppe (interrupting) What letter are you referring to?

Q. (By Mr. McCurtain) I am referring to the letter of February 25, which letter I showed you a moment ago. You [123] said it referred to the other contracts, until I called your attention to the CX510, and then you asked me what that meant. You say you took that up with your counsel, and he told you not to answer it?

A. I took the matter up as regards all contracts that had expired.

Q. Let's be fair, Mr. Herber; I ask you, do you now say to this court that you took the question of answering this letter of February 25 up with your counsel? A. Yes, sir.

Q. And what did your counsel tell you?

A. He advised that it was not necessary to answer the letter in regard to contracts that were not in force.

Q. And did that advice appeal to you as fair business?

A. Well, we had discussed the question of expired contracts when you were present.

Q. Oh, no; I am talking about February 25, long before I was present, long before we came up here and then asked you again, would you keep

(Testimony of J. P. Herber.)

your contracts. I am talking about February 25. Let me show it to you again. You say on your oath here that you told Mr. Connolly January 11 that you would not fulfill, and that was long before the strike ended; and you say also on your oath that you thought you had mailed the letter of January 8? A. That is right.

Q. Now, then, I say if that be true, why didn't you answer the plain business inquiry of my client under date of February 25, almost a month before the conference in Seattle?

A. I can't answer that question except as I have already [124] answered you.

Q. Very well. You have made your only answer to that? Now, I ask you, Mr. Herber, why it is that you say to this court that you considered these contracts all of them void after January 8, when you conferred with your counsel, why it is that on February 24, you stated that you were going to ship the contracts which were due the previous October for lumber to Hong Kong?

A. The Hong Kong contracts had no bearing on the Shanghai.

Q. They are in identical language, are they not? They contain the same strike clause, do they not?

A. We never put an order on the line that has already expired without getting the buyer's permission to ship it.

Q. All right, when did you get the buyer's permission to ship the CX2813, 14, or CX2858?

(Testimony of J. P. Herber.)

A. We gave them the advice and followed it up by a line-up, which you have there, and there was no objection to it.

Q. Wait a minute. Do you say that this letter of yours of February 24 sought our advice as to whether we would accept it?

A. It says here, "confirming our verbal advice to Mr. Connolly yesterday."

Q. And we on the next day asked you what was happening to 510, in answer to that letter, and thanked you for your advices about 2813 and 14, did we not?

A. All I can say, counsel, is that we assumed that our contracts stood on their own merits, and it wasn't necessary to answer your letter.

Q. And you considered that 2813 and 14 were still in force, [125] and you so notified us?

A. The letter was to confirm advice to Mr. Connolly that we were taking the buyer's orders. We assumed that Mr. Connolly agreed to it. I can't go into details at this late date, because many of the details are handled by others in the office.

Q. And you considered those contracts in full force and effect, namely those mentioned in your letter?

A. Only subject to buyer's approval.

Q. And you considered your number 4609, number 4, our CX549 mentioned in the letter as in effect, did you not?

(Testimony of J. P. Herber.)

A. We didn't until we advised the buyer that we could make shipment, and the buyer stated that they had to complete their order. We stated we could.

Q. When did the buyer state they had to complete their order? Do you find any such language in any of the correspondence?

A. It specifically states here "confirming our verbal advice to Mr. Connolly yesterday." I assume we advised Mr. Connolly we would and could make shipment, and he agreed to accept it.

Q. Then why on March 6th, after the logs were aboard the vessel, did you ask us to pay eighty-seven and a half cents additional freight by your letter of March 6, if you considered the contracts confirmed and asked us to make a new contract?

A. We advised Dant & Russell that we would complete the contract——

Q. (interposing) By verbal agreement on January 11 you advised them, and that is all the advice, isn't it?

A. We didn't advise them on January 11 that we would complete [126] the contracts, because the strike was still in effect and no one could tell when the strike was going to end.

Q. And you told them then on January 11 orally the deal was off?

A. We told them January 11 that unless our freight contracts were reinstated, we could not re-

(Testimony of J. P. Herber.)

instate our contracts that were no longer in force.

Q. All right. Now, you just give this court the best explanation you can why it is that you sought by your letter of March 6 to get Dant & Russell to pay eighty-seven and a half cents more than the contract price? Give the court the best explanation you can think of.

A. Because that was the understanding with all shippers, that——

Q. (interrupting) Now you are talking about a custom, aren't you?

A. No; on these particular contracts.

Q. With whom did you have such an understanding with all your shippers as far as Dant & Russell are concerned?

A. Well, we simply advised all the shippers that we could reinstate certain contracts at an increase.

Q. Do you say anything about reinstating that contract there?

A. Well, we referred again to our advice of February 24, where we stated that we could make shipment.

Q. You said they were on the line-up ready for shipment. You didn't say you could make shipment. You said they were being lined-up for delivery to the hold of the vessel on February 24, did you not?

A. We say "confirming our verbal advice to Mr. Connolly, the following orders for your account are on the line-up at [127] the vessel."

(Testimony of J. P. Herber.)

Q. What does that mean? Explain to the court what "on the line-up for the vessel" means? That means they are on the dock ready to be put in the hold?

A. Not necessarily. It is simply an advice that they are on the line-up for a certain ship.

Q. And what does "line-up" mean?

A. "Line-up" as expressed in lumber shipping, on steamship lines is a detail of the cargo as it is to be shipped.

Q. The pieces counted and so forth?

A. No, just order numbers and a general description of the cargo; no piece tally or anything.

Q. In other words when you say it was on the line-up for delivery, you meant you had it in mind to deliver it? Had you done more than that in preparation?

A. I assume that we advised Mr. Connolly that we could have this Hong Kong cargo, and that we could make shipment on board this vessel.

Q. And you assume that? A. Yes, sir.

Q. All right then, I will assume it also. Having assumed that, do you mean that you are ready to go ahead and complete that contract?

A. If they want the cargo.

Q. They answered and said, "We thank you very much for your advice, but what about CX510, the previous shipment?"

A. That had expired. It was no longer in force.

(Testimony of J. P. Herber.)

Q. Oh, you, under advice of counsel, did not so tell them; you just let it ride and said nothing?

A. That is correct. [128]

Q. So then on March 6 you asked them to pay eighty-seven and a half cents differential by your letter of March 6? You asked them to stand eighty-seven and a half cents additional freight, did you not? A. That is correct.

Q. And they told you on the 8th that they would not do it? A. That is correct.

Q. In effect?

A. That is correct. I waived the extra cost.

Q. You waived it and shipped at the contract price?

A. That is correct. That contract was still in force after the strike.

Q. Now, on March 18 you handed to me, as counsel for the plaintiff, a letter of January 8, that is correct, is it not?

A. That is correct, a copy of a letter.

Q. And did you not at that time advise Mr. Dant and myself that you would, within a week, state in writing whether or not you would fulfill these contracts by the end of that current week?

A. I think that is correct.

Q. Did you do so? A. Yes, sir.

Q. Will you show me where you so advised us? Isn't it a fact, Mr. Herber, that you did not so advise us, and that Wednesday of the following week we wrote you and asked you why you had not

(Testimony of J. P. Herber.)

done so by the letter you find there of March 24?

The Court: Answer the question if you can, Mr. Herber. [129]

A. We answered your request on March 29.

Q. After receiving our letter of the 24th, which called your attention to the fact that you had not kept your previous bargain to answer during the current week, isn't that true?

A. It says here, "the writer was absent from the city the best part of last week, and your letter was brought to his attention this morning. That accounts for the delay."

Q. That refers to the letter of March 24, does it not, from Dant & Russell?

A. That answers Dant & Russell's letter of the 24th.

Q. Let me phrase it this way, Mr. Herber; is it not a fact that on March 18, long after you now say the contracts were of no further effect, you declined in your office to commit yourself in writing on the proposition? A. I did.

Q. That is to say, you did refuse to commit yourself? A. I refused to commit myself.

Q. Mr. Herber, you testified in answer to your counsel's question in substance that you took advice from counsel and concluded about January 8 that you were not liable under these contracts, and so notified your various buyers who had contracts with you, did you not? A. That is correct.

(Testimony of J. P. Herber.)

Q. That is correct, is it not?

A. Yes, sir.

Q. I now ask you whether it is not a fact that subsequent to that time, and subsequent to the strike, you did not ship to Balfour Guthrie & Company approximately three-quarters of a million under similar contracts, at the contract [130] price?

Mr. Schweppe: I object to that, if the court please, because the court has already sustained one objection as to any performance that this defendant might have entered into with a third person.

The Court: Well, this is cross examination, and the objection is overruled. Answer whether you did or not. A. By special——

Q. (By Mr. McCurtain, interrupting) I will reframe it. I ask you if it is not true that subsequent to the strike you billed to Balfour Guthrie's branch of this city, under contracts identical insofar as the printed form is concerned, several contracts covering 742,043 feet of lumber at the contract price?

Mr. Schweppe: I renew the objection, if the court please.

The Court: The objection is overruled.

Mr. Schweppe: Exception.

The Court: Exception allowed.

A. We did by special arrangement.

Mr. McCurtain: That is all.

The Court: At this time we will take an adjournment of these proceedings until tomorrow at 10:00 in the forenoon. Court is adjourned until that time.

(Whereupon an adjournment was taken until 10:00 o'clock A. M. Wednesday, October 5, 1938, at which time proceedings were resumed as follows:)

The Court: You may proceed in the case on trial. I believe Mr. Herber was on the stand. [131]

Mr. Schweppe: Have you any further examination of Mr. Herber?

Mr. McCurtain: No.

The Court: Do you desire any further questions of Mr. Herber?

Mr. Schweppe: No, I am not asking Mr. Herber any further questions. I want to call Mr. Connolly for a question or two.

The Court: Mr. Connolly has already been sworn. You may proceed.

JOE J. CONNOLLY,

called as an adverse witness on behalf of the defendant, being previously duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Connolly, isn't it a fact that on or about January 4, 1937, as a representative of Dant & Russell, you attended a meeting of Seattle shippers

(Testimony of Joe J. Connolly.)
which was called for the purpose of seeing whether or not the steamship companies serving exporters on thePacific Coast, including Grays and Willapa Harbors, could be induced to reinstate the contracts?

A. That is true. I don't recall the exact date, but about that date.

Q. You were present at that meeting as a representative of Dant & Russell? A. Yes.

Q. And the meeting was called of course because the steamship companies had cancelled their space? A. That is true. [132]

Mr. Schweppe: That is all.

Cross Examination

By Mr. McCurtain:

Q. Mr. Connolly, do you recall what statements, if any, were made by Mr. Harber of the defendant concern at that meeting, concerning his obligations to fulfill contracts?

A. I don't recall any statement that Mr. Herber made personally, but Mr. Herber was, I would say, the guiding light in that organization of exporters. The argument was made very strongly to the steamship companies that we, as exporters, were bound to ship our contracts; and that, with that in view, we petitioned and pled with the steamship company to reinstate their contracts. The argument was brought out that irrespective of whether the steamship companies cancelled their

(Testimony of Joe J. Connolly.)

contracts or not, we, as exporters, were bound to ship our lumber. The statement was further made, and it was attempted when the steamship companies appeared to be a little hard to deal with, it was requested that each and every exporter cable his principal in Japan—this particular meeting dealt only with business to Japan—that each and every exporter cable his agent in Japan to the effect that unless certain things were done with regard to these contracts, that there would be a mass repudiation of these contracts. It was deemed absolutely necessary that every exporter cable such information. This was very difficult to do because there were several exporters, including ourselves, who were not willing to send such cables.

Q. Now, Mr. Connolly, you heard Mr. Herber's testimony here yesterday to the general effect that he notified you on [133] a certain date as I recall it, asking you whether your concern would reinstate the contracts which are our numbers 2813 and 14, and subsequent numbers, concerning the shipment of lumber to Hong Kong. Was any such statement ever made to you by Mr. Herber?

A. Such language was never used in connection with those contracts.

Q. When, Mr. Connolly, was the first date when you received any information from Mr. Herber or anyone else connected with the defendant concern to the effect that they were likely to repudiate these contracts?

(Testimony of Joe J. Connolly.)

A. The first few days in March. I don't recall the exact day; around the 5th, 6th, or 7th of March.

Q. Do you recall whether that came by way of a letter approximately March 6 addressed to Dant & Russell, in which the request was made for additional freight?

A. That is the first intimation we had that anything was wrong.

Q. And what then was subsequently done about the question as to reinstatement or confirmation of the contracts?

A. Well, the result of that, my advice to my principals, was this meeting held in Seattle between yourself, Mr. Dant, Mr. Collins of Shanghai, Mr. Schweppe and Mr. Herber.

Q. That is the meeting of March 18 when I came up? A. The meeting of March 18.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all.

(Witness Excused.)

Mr. Schweppe: I will call Mr. Young. [134]

WILLIAM J. YOUNG,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Young——

The Court: (interrupting) Will you have him state his name for the record?

(Testimony of William J. Young.)

Q. Will you state your name please?

A. William J. Young.

Q. By whom are you employed, Mr. Young?

A. I am auditor and traffic manager of the Grays Harbor Exportation Company.

Q. How long have you been employed by that company? A. Since July of 1928.

Q. Referring now first to a memorandum which I hand you, I ask you whether or not you acted as the secretary of a meeting on or about January 4, 1937, called for the purpose of inducing the steamship companies serving Pacific Coast Lumber Shippers, including Grays Harbor and Willapa Harbor, to reinstate shipping contracts previously cancelled? A. Yes.

Q. Did you act as the secretary of that meeting? A. Ex officio, not officially.

Q. Did you make any memoranda at that time concerning the time and date of the meeting and the persons present? A. Yes, sir; I did.

Mr. McCurtain: We will admit, Mr. Schweppe, that Mr. Connolly was present at that meeting.

Mr. Schweppe: All right, thank you. [135]

Q. (By Mr. Schweppe) Now, Mr. Young, referring to the date of January 11, 1937, do you have any memorandum in your files, in your own personal files, showing a conversation on that date with Mr. Connolly? A. I have.

Q. Will you produce it please? For the purposes of the record will you describe the book which you have in your hand?

(Testimony of William J. Young.)

A. This is a day book that I keep of all calls, or all transactions that go through my hands during the course of the day.

Q. With reference to the date of January 11, what does your daily memorandum book show?

Mr. McCurtain: Just a moment please. I object to any further testimony as to the conversation of January 11, for the reason and on the ground that Mr. Herber yesterday testified that as late as March 18, some weeks after the strike had ended, he at that time refused to commit himself as to the fulfillment of these contracts or their repudiation; so that whatever notice he may have given or claims to have given orally to Mr. Connolly on January 11 would have no binding effect here.

Mr. Schweppe: As a matter of fact I think the record shows right in the letter file that, at least as to March 18, you were advised as to the position of the Grays Harbor Export Company, isn't that right?

Mr. McCurtain: Yes, on March 18 the record also shows that I asked Mr. Herber in your presence whether he would state, and either sign this letter of which he gave me a copy, or commit his company in writing; and he [136] refused to do so, and he so admitted on the stand.

The Court: It may be that the question put is improper, to have him state what the record shows. If he wants to state what he knows, that is another matter.

(Testimony of William J. Young.)

Mr. Schweppe: I think that is proper criticism of the question.

Q. (By Mr. Schweppe) Mr. Young, what did occur on January 11 with reference to any conversation with Mr. Connolly, according to your own personal knowledge?

Mr. McCurtain: I renew the objection.

The Court: The objection is overruled.

A. Early in the morning, about the first thing in business, Mr. Herber came out and told me to—

The Court (interrupting): No.

Q. (By Mr. Schweppe) No, tell what happened with respect to Connolly, not what Mr. Herber told you.

A. I called Mr. Connolly and asked him to come over to our office.

Q. You called him? A. Yes, sir.

Q. At whose instructions?

A. Mr. Herber's.

Q. Do you have any further notations in your daily memorandum book as to further conversations had with Mr. Connolly?

A. Yes, I have.

Q. Will you just give those dates if you can, having first refreshed your memory, if that is necessary?

A. If I may step down here, it will save time. (Witness procures a document). Subsequent to January 11, on January 23, January 27 and February 17. [137]

(Testimony of William J. Young.)

Q. What is your recollection as to those dates which you have just named?

A. The one on the 23rd I couldn't say.

Q. The 23rd of what?

A. The 23rd of January. I couldn't say exactly what the discussion was. It may have been a telephone conversation, or it may have been that Mr. Connolly was in the office. On January 27 it was a discussion regarding quotations on Japanese specifications, having no bearing on this case. On February 17 he called and asked when and if we were going to ship the logs.

Mr. McCurtain: Pardon me, Mr. Young; don't you mean February 15?

The Witness: February 17 according to my book.

Mr. Schweppe: The 17th I am quite sure, because that is the figure he gave me this morning.

Mr. McCurtain: All right.

The Court: As far as I recall you have not asked this witness what transactions he had, if any, with Mr. Connolly.

Mr. Schweppe: I am about to ask him that, if the court please.

Q. (By Mr. Schweppe) Did you personally have any conversation with Mr. Connolly?

The Court: Starting on a certain date, January 11, for instance.

Q. Did you have any conversation with Mr. Connolly on January 11?

(Testimony of William J. Young.)

A. January 11 was to ask him to come over to our office, no further conversation. [138]

Q. What conversation did you have with him on the next date named? A. I couldn't say.

Q. What conversation did you have on the next date named?

A. That was a discussion of quotations on Japanese specifications, new business.

The Court: New business, as to which this lawsuit has no concern?

The Witness: No.

Q. That is right; and what was your conversation on the next date named?

A. Mr. Connolly asked me when and if we were going to ship the logs.

Q. And what did you say?

A. I couldn't give him an answer, because I had to refer that to Mr. Herber, who was out of town at the time.

Q. How long have you been in the export business, Mr. Young? A. Since October of 1927.

Q. You have been continuously connected with the business of exporting lumber to the Orient and other parts of the world? A. Yes, sir.

Q. Mr. Young, I hand you Plaintiff's Exhibits 7, 8, and 9, which purport to be contract files and shipment data between Grays Harbor Exportation Company and Dant & Russell, and ask you to tell the court about the transactions shown there.

(Testimony of William J. Young.)

A. Exhibit No. 7 is a contract for a hundred thousand feet of Hong Kong boards, 50,000 feet for shipment October, 50,000 for shipment in December. It is covered by Dant [139] & Russell's contract number 2813, C2813.

Q. Will you state for the record when those shipments were made?

A. They were made on the motorship Granville the 5th day of March, 1937.

Q. That was after the strike was over?

A. Yes, sir. That is Exhibit No. 7.

Q. Take the next one.

A. Exhibit No. 8 is our order——

Mr. McCurtain: Mr. Young, your one number covers our two numbers. That is the reason you are confused.

A. Oh, I see. This would be one-half of the order I just gave the particulars of.

The Court: Speak again of the particulars you stated in connection with Exhibit 7?

A. This is part of our order number 4624, and it is Dant & Russell's order number C2814, covering 50,000 feet of Hong Kong boards, shipped on the M.S. Granville, March 5, 1937.

The Court: Is that a new contract or an old contract?

The Witness: It is an old contract. It is part of our contract number 4624, dated October 7.

Q. (By Mr. Schweppe) Just for the purpose of informing the court, will you go a little further and

(Testimony of William J. Young.)
point out to him the date of the contract and what shipment period it called for?

A. The date of the contract was October 7, and the shipment was 50,000 feet October, 50,000 feet December. Exhibit No. 9 is our order number S4647, Dant & Russell's C2858, [140] calling for 50,000 feet of Hong Kong boards for shipment in the first half of November, 1936. The date of our contract is October 19, 1936. It was finally shipped on the M.S. Granville March 4, 1937.

Q. You have covered all those exhibits, 7, 8 and 9? A. Yes.

Q. Now, Mr. Young, will you state whether or not the shipments made under those contracts, or the shipments of the merchandise described in those contracts, was made pursuant to any additional conversations with reference to those shipments or otherwise? A. Yes, sir; it was.

Q. Will you state what the fact about those shipments is in that respect?

A. I think it was February 23, when we were going over our records and making up line-ups, these orders were studied.

Mr. McCurtain: Just a moment. I object, if Your Honor please, to what was done by these people in their own office, unless he shows something that was said to the plaintiff here.

Q. (By Mr. Schweppe) Will you state, Mr. Young, whether or not you had a conversation with Mr. Connolly on or about February 23?

(Testimony of William J. Young.)

A. Yes, I did.

Q. With reference to these Hong Kong shipments? A. Yes, sir.

Q. Will you state what that conversation was?

A. We informed him that we were prepared to make shipment of these contracts on the motorship Granville, and asked for his authority to do so. [141]

Q. Did you consider his consent necessary?

A. Yes.

Mr. McCurtain: I object to that question, if Your Honor please.

Q. (By Mr. Schweppe) Well, let me ask you this then; why did you ask Mr. Connolly?

A. Because the shipment period of the contracts had expired, and we wouldn't dare ship an order on a contract without first getting the authority of the buyer.

Q. I refer you now, Mr. Young, to a letter dated February 24, 1937, which is one of the letters contained in Plaintiff's Exhibit 11, and ask you what bearing that letter of February 24 has on the Hong Kong shipments?

A. This is a letter that I gave to our stenographer to confirm a conversation with Mr. Connolly on the previous day concerning these orders, notifying him that we were definitely lining them up for shipment on the M.S. Granville.

The Court: What is the date of that?

The Witness: February 24, 1937.

(Testimony of William J. Young.)

Q. (By Mr. Schweppe) One further question about these Hong Kong orders. Were these shipments made to Hong Kong, which were covered by Exhibits 7, 8 and 9 and this additional conversation you had with Mr. Connolly on February 23, were those shipments for which you got space at any increased cost over the freight commitment originally made? A. No, sir.

Mr. McCurtain: I object to that as incompetent, Your Honor, irrelevant and immaterial. [142]

Mr. Schweppe: Well, I think it is quite material. These people are relying on these contracts as a matter of construction. I think we are entitled to show that it did not cost anything to go through with these particular contracts.

The Court: The objection is overruled.

Q. (By Mr. Schweppe) Will you state whether or not the shipment of these three contracts to Hong Kong, Exhibits 7, 8 and 9, required any additional outlay over that originally contracted for in those contracts? A. They did not.

Q. Now, Mr. Young, referring to Plaintiff's Exhibit 1, part of which is a contract dated September 1, 1936, between Grays Harbor Exportation Company and Dant & Russell, Inc., on a form of the Grays Harbor Exportation Company, and directing your attention particularly to the general conditions that are printed at the end of that contract, I ask you whether there is or whether you know of any custom in the export business with reference to

(Testimony of William J. Young.)
shipment under that clause which you have before you in that Exhibit 1?

A. In what way? I don't understand you?

Q. I say, does there exist any custom, or do you know of any custom with reference to shipment under that clause? A. No.

Mr. Schweppe: You may cross examine.

Cross Examination

By Mr. McCurtain:

Q. You say there is no custom concerning shipments under that clause? [143] A. No.

Q. Why then did you ask the consent of the buyer to ship under it?

A. The contracts had expired, and we had to get their authority to ship, asked them if they wanted the cargo, and they did, and we got their authority to ship.

Q. Do you understand that you can change a written contract or renew it by an oral notice that you are about to ship under it?

Mr. Schweppe: He is asking him a question of law. The witness can testify what he actually did.

The Court: Well, it is cross examination. If he knows the answer, there is no reason why he can't give it. A. No, I don't know that.

Q. (By Mr. McCurtain) Now, would you have shipped these shipments of lumber had the freight rate been increased? You said you shipped them at no additional cost to yourselves; would you have

(Testimony of William J. Young.)

shipped them had that freight cost been increased?

A. Under certain conditions.

Q. What conditions?

A. The exporters had absorbed the increase in freight.

Q. You mean to say if the purchaser would absorb the increase in freight?

A. I didn't hear you.

Q. You mean if Dant & Russell would have absorbed the increase in freight, you would have shipped?

A. You would have to go into a lot of history in connection with those Oriental shipments.

Q. Well, we don't need to go into any history. I am just [144] asking you. You said that the reason you shipped those at the old contract price, referring now to the Hong Kong lumber, was because you did it at no additional cost to yourselves by way of freight. That is true, isn't it?

A. I said that there was no — that they were shipped at no additional cost to ourselves.

Q. Now I ask you, would you have shipped them had there been an additional cost to you?

A. Under certain conditions. I don't know. There was no additional cost to us, and I could not say.

Q. Would you have shipped them had there been an additional cost to you?

Mr. Schweppe: I think that is calling for an opinion.

(Testimony of William J. Young.)

The Court: If he knows, why he can answer.

A. I don't know.

Q. You don't know? A. No.

Q. You know that you did ship 4609 number 4 at an increased cost, do you not? A. Yes.

Mr. McCurtain: That is all.

The Witness: That was not a Hong Kong order.

Redirect Examination

By Mr. Schweppe:

Q. Mr. Young, will you, just for the advice of the court, state the difference in your conception between orders destined for Hong Kong and destined for Shanghai?

A. The Hong Kong market, the space to the Hong Kong market is controlled by the Pacific Westbound Conference, and [145] all shipments made to Hong Kong must go on Conference line vessels, and it is under a contract signed with the Conference that shipments are made. The volume to Hong Kong is insignificant as far as Oriental shipments go, and the conditions applying to Hong Kong are not the conditions that would apply to Shanghai or other north China or Japanese markets.

Q. In what respect do the shipping conditions to Shanghai and other Japanese markets differ?

A. The rates are open, or covered by a gentlemen's agreement among the Conference Lines. Charters can go in there. A vessel may be chartered

(Testimony of William J. Young.)

for operation in those markets, and the volume is tremendous as compared with Hong Kong.

Q. When you speak of the Conference, for the purpose of the record and the information of counsel and the court, will you state what that means?

A. The Pacific Westbound Conference is an association of lines under the Shipping Act of 1916, whereby they are relieved of certain stipulations of the anti-trust laws, and can fix rates and regulations for the operating conditions in that trade only.

Q. After the strike was over on February 5, was it possible to get any space out of Willapa Harbor?

A. Not for us.

Q. Destined for Shanghai? A. Not for us.

Q. I will refer you to contract number 4609, to which counsel just referred, 4609, number 4, being 500,000 feet destined for Shanghai, shipment to be made in February. Counsel asked you whether or not that was not done at increased [146] cost. I will ask you whether this Exhibit 6, to which counsel just referred, is not the contract that was still in force under its original contract period of shipment at the time the strike terminated?

A. Yes, sir. It was in force.

Q. And the reason you carried that one out is because you were obligated to do so under the original terms? A. Yes, sir.

Mr. Schweppe: I think that is all, Mr. Young.

(Testimony of William J. Young.)

Recross Examination

By Mr. McCurtain:

Q. Do you understand that the contract last referred to was in force because the thirty days had not expired since the cessation of the strike?

A. No, sir; because at that time—Mr. Schweppe asked me if it was not in force at the time the strike terminated.

Q. You consider that was in force at the time the strike terminated? A. Yes, sir.

Q. And that you only had four days gone during that month? A. Five days.

Mr. McCurtain: That is all.

Mr. Schweppe: That is all, Mr. Young.

(Witness excused.)

Mr. Schweppe: Mr. Herber, please. [147]

J. P. HERBER,

recalled as a witness on behalf of the defendant, being previously sworn, testified as follows:

Direct Examination

By Mr. Schweppe:

Q. Mr. Herber, you heard Mr. Connolly testify that at the meeting of shippers on or about January 4, you made certain statements at the meeting to the tenor and effect that you were bound to ship, and therefore wanted the steamship companies to make

(Testimony of J. P. Herber.)

good on their commitments. Will you state your version of what you said at that meeting? Did you make the statement that you wanted the steamship companies to reinstate because you were bound to ship under your contracts? A. I did not.

Q. Will you tell the court what statement you did make?

A. I explained, not once, but several times to the exporters, that we were protected on our contracts; and my only interest in the conference was to help the other exporters secure a fair deal from the steamship companies.

Q. And just one more question; does the Grays Harbor Exportation Company sell direct to the Orient? A. We do not.

Q. To whom do you sell?

A. We sell to the exporters on this side.

Q. The Grays Harbor Exportation Company is a representative of how many mills?

A. Sixteen mills.

Q. Located where?

A. Grays and Willapa Harbors.

Q. And the people to whom you sell are lumber shippers [148] located where, or lumber exporters?

A. In Seattle, Tacoma, Portland and Vancouver.

Mr. Schweppe: That is all, Mr. Herber.

Mr. McCurtain: That is all.

(Witness excused.)

Mr. Schweppe: The defendant rests.

Mr. McCurtain: I would like, Your Honor, to ask Mr. Connolly just one question. I think he can answer it from where he is.

The Court: On rebuttal?

Mr. McCurtain: Yes.

JOE J. CONNOLLY,

recalled as a witness on behalf of the plaintiff in rebuttal, being previously duly sworn, testified as follows:

Direct Examination

By Mr. McCurtain:

Q. You heard Mr. Young's statement, Mr. Connolly, to the effect that on the 23rd of February, 1937, he asked you whether Dant & Russell would consent to reinstatement of the Hong Kong contract? A. I heard that, yes.

Q. Was any such statement ever made to you by him?

A. Definitely not. Any discussion was along the same lines as the letter he wrote confirming the discussion, that he had advised me that it was going on that boat, and he confirmed it the next day in almost identical language by letter.

Q. There was no such statement as he has testified to asking whether you would accept?

A. No. [149]

Mr. McCurtain: That is all.

Mr. Schweppe: That is all.

(Witness excused.)

Mr. McCurtain: That is our case, Your Honor. I would like to suggest to Your Honor that my client considers this case of grave importance, not so much for the amount of money involved, but for a principle which we think ought to be established by the trial of this case; and that inasmuch as we are going to have, by previous arrangement, a transcript of the entire proceeding, with which Your Honor will be furnished of course the original and counsel a copy, that we brief this case again, if Your Honor will thus be imposed upon, and that after we have briefed it we then fix, if Your Honor will permit, a day for oral argument after we have the record before us; or if Your Honor prefers no oral argument, we would be satisfied to submit it without argument on brief.

The Court: I have no objection to oral argument. It is very much like any situation, though, gentlemen; one side has got to lose, and the side that loses usually is not satisfied with it; and the quicker you get over the circumstance of losing and winning, the better it is for both sides.

(Discussion with regard to time of argument.)

The Court: The court fixes the time of the argument as November 1, when the court's business with reference to the closing of the old term and the opening of the new is finished on that day. You gentlemen get in your briefs as soon as you can. [150]

Mr. Schweppe: We shall.

(Whereupon the case was adjourned until 10:00 o'clock A. M. on Tuesday, November 1, 1938, at which time proceedings were resumed as follows:) [151]

[Title of District Court and Cause.]

DECISION AFTER TRIAL

Bayley & Croson, Seattle, Washington,
Allen H. McCurtain, Portland, Oregon,
Attorneys for Plaintiff.

McMicken, Rupp & Schweppe, Seattle, Washington,
J. Gordon Gose, Seattle, Washington,
Attorneys for Defendant.

This action tried by the court without a jury was brought by the buyer against the seller to recover damages for breach of contract for the sale, shipment and delivery of about 3,200,000 feet of Pacific Hemlock logs for export to China. The several contracts involved called for shipment in October, October/November, November/December, December, January and February. Plaintiff buyer's complaint alleges that part only of the logs called for by the contracts were delivered and that after demand upon defendant seller for delivery of the remainder of the contracted logs plaintiff was compelled to purchase such remainder elsewhere, to plaintiff's total damage in the sum of $17,272.17, for which plaintiff seeks judgment against defendant.

Defendant seller pleads, among other things, nonliability by reason of a strike of longshoremen which prevented defendant from making the required shipment and delivery during the delivery months [152] provided for in the contracts, and by reason of the contract exemption from liability for nonshipment and nondelivery occasioned by strikes. Plaintiff, however, contends that under the law and a custom applicable to the contracts and under a practical construction of the contracts made by the defendant, the latter was obligated to perform the contracts during a reasonable time after the cessation of the strike. Whether defendant was so obligated is the question for decision, which depends primarily upon the construction of the contract provisions.

Bowen, District Judge:

The contracts all contain a strike clause providing that " * * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes, lockouts, or labor disturbances * * *." But the seller is given an option to make delayed delivery by the following contract provision: "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

The contracts also contain the following language: "The terms of this contract are herein stated in their entirety, and it is understood that

there is no verbal contract or understanding governing it."

This court is not advised of any controlling Washington state authority upon the proper construction of these particular contract provisions.

In the case of Normandie Shirt Co. v. J. H. & C. K. Eagle, 144 N. E. 507 (N. Y.), a contract for the sale of shirting called for "delivery June-July-Aug.-Sept." and contained a strike clause providing that * * * strikes * * * prevent- [153] ing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder." And the New York court held that a strike preventing delivery during the months specified absolved the seller not only from liability for delay but also "from any liability," which would include liability for failure to deliver at all.

Concerning contracts like that involved in that case absolving the seller from any liability for failure to deliver due to frustration of the contract by labor strikes, the New York court (at pp. 510-511 of 144 N. E.) said:

> "When deliveries according to contract have been prevented, by strikes of a substantial nature, or other like excepted causes, the party is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter. As to the installments not delivered according to contract, the contract is terminated. Whether this termination would extend to separable install-

ments falling due after the strike, which it would then be within the capacity of the seller to deliver within the contract term, we do not need to consider. At least as to the installments falling due within the period of disability, the obligation would be ended. As to such installments, if it be the intention of the parties that the strike clause is merely to delay delivery, so that goods which could not be made or delivered because of a strike must be subsequently made or delivered within a reasonable time thereafter, the contract must clearly so provide (Citing cases) * * *

The cases referred to by the respondent will be found to have clauses in the contracts involved clearly indicating that delivery was to be delayed, and made up subsequently to the termination of the cause of delay. We conclude, therefore, that this clause entitled the defendant to terminate the contract on September 30th, and to refuse to deliver any goods thereunder of which delivery has been prevented by strikes. In other words, it could not deliver by September 30th, the goods which the plaintiff had ordered, by reason of the strike. The contract as to these undeliverable goods was therefore at an end, and the defendant was not obliged to make them up and to deliver them later. This clause did not call for a later or postponed delivery."

To the same effect are the following cases involving various force majeure clauses: Black & Yates v. Negros-Philippine Lumber Co., 231 Pac. 398 (Wyo.); Kunglig [154] Jarnvagsstyrelsen v. National City Bank, 20 F.(2d) 307; Atlantic Steel Co. v. R. C. Campbell Coal Co., 262 Fed. 555; Edward Maurer Co. v. Tubeless Tire Co., 285 Fed. 713; Indiana Flooring Co. v. Grand Rapids Trust Co., 20 F.(2d) 63.

Under similar circumstances, and in the absence of a contract option to the seller to make later delivery, the buyer likewise is absolved from any liability to take delivery after expiration of the contract period of delivery. General Commercial Co. v. Butterworth-Judson Corp., 191 N. Y. S. 64; Haskins Trading Co. vs. S. Pfeifer & Co., 130 So. 469 (La.).

Does the liability exemption provision of the contracts in suit absolve the defendant seller from liability to deliver after the contract delivery period? The language of the contracts in question here is: "* * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes * * *." It is to be noted in this strike clause that the word delay occurs in connection with the statement of nonliability for both nonshipment and nondelivery, and further that the seller is not to be liable for nondelivery as well as nonshipment. The provision as to delay, however, is not that the seller is not to be liable for delay *in**

*Italics in this decision are by the court.

shipment nor for delay *in* delivery, and is not confined to delay alone, but the provision is that the seller is not liable for delay *or* nonshipment *or nondelivery.* Obviously these words are not synonymous, and by the use of the word "nondelivery" some meaning in addition to that meant by "nonshipment" must have been intended. As no sale can be completed without delivery, conditionally absolving the seller from liability for nondelivery in a sales contract is equivalent to freeing the seller of his obligation to perform the sales contract when the nonliability-for-nondelivery condition [155] happens. When applied to the question of this defendant seller's liability, there is no substantial difference in meaning between the phrase " * * * the seller is not liable for * * * nondelivery if occasioned by * * * strikes * * * as used in the contracts in suit," and the phrase " * * * strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder" as used in the contract involved in the Normandie Shirt Co. case, supra.

The provisions for the contract delivery periods in the Normandie Shirt Co. case and in this case are similar, and those provisions are not ambiguous nor uncertain in either case. If the seller was not, under the strike clause absolving "the seller from any liability" in the Normandie Shirt Co. case, obligated

to make delivery during a reasonable time after the cessation of the strike, then as regards the portion of the contract period which expired during the strike the defendant seller in this case is not obligated for a reasonable time or any time after the strike to make delivery, because excused therefrom under the strike clause here providing that "* * * the seller is not liable for * * * nondelivery if occasioned by * * * strikes, lockouts or labor disturbances * * *." Defendant is not, therefore, obligated under the contract provisions here to deliver after the strike any of the logs which according to the contracts should have but for the strike been delivered during it. The proof does not show that the strike period ended before the expiration of the contract delivery period, and the court understands any contention about that raised by the pleadings was abandoned at the trial. [156]

Plaintiff's contention that by a custom pertaining to the trade defendant is obligated for a reasonable time after the termination of the strike to make delivery is not tenable, because the contract terms above noticed relating to time of delivery and the effect of the strike clause thereon are so clear and unmistakable on the point affected by the alleged custom that to apply the custom, if one existed, would obviously violate the express agreement of the parties relating to nonliability of the seller for nondelivery. Under the law, custom cannot be employed to produce that effect, nor at all where, as here, there is no ambiguity or uncertainty

as to the provisions or meaning of the contract sought to be explained by the alleged custom. In this case custom is at least impliedly, if not expressly, excluded by the terms of the contracts themselves. Thus one of the necessary conditions for permissible application of custom is lacking. 17 C. J. 508 (Sec. 77); Keen v. Swanson, 129 Wash. 269; Moore v. United States, 196 U. S. 157; The Albisola, 6 F. Supp. 392.

In this connection, however, the court is not convinced that the proof is sufficient to establish the custom relied upon by plaintiff even if proper proof of it would do no violence to the terms of these contracts. Two of the officials of plaintiff company testified in effect to the existence of a custom calling for delivery within a reasonable time after the strike, but two of the defendant's officers or agents denied any knowledge of such a custom. Other witnesses were not in entire accord as to the existence of such a custom nor as to certainly what it was. There is here no convincing evidence free from ambiguity, uncertainty or variability establishing a uniformly prevalent and universally observed custom calling for delivery within a reasonable or [157] certain time after the expiration of the contract period or the strike impediment, as is required by such authorities as Washington Brick, Lime & Sewer Pipe Co. v. Anderson, 176 Wash. 416.

Plaintiff further contends that, by performing other similar contracts (some with plaintiff and some with third parties) and by a course of inaction

as to the contracts in suit, defendant has placed a practical construction on and has recognized the binding effect of these contracts as contended for by plaintiff. But on this phase of the case the proof again does not convincingly support plaintiff's contention. The evidence on this point is not free of conflict, and all of it is of a very general nature, but such as there is leads to the conclusion that the attending circumstances were, in the case of the other performed contracts, different from the circumstances which would have attended performance by defendant of the contracts in suit, unsettled freight rates following the strike and the fact that the freight rates actually paid by plaintiff in substitute performance and included in plaintiff's alleged damage were higher than those applicable before the strike are examples of such different attending circumstances. Likewise, the court is not convinced that defendant's course of inaction respecting performance of the contracts now in question was of such character as to indicate that defendant before suit placed on the contracts a construction different from that so placed by it after suit, especially in view of the contract option to the defendant seller to make delayed delivery within thirty days after the strike.

Regardless of the effect of the evidence just noted, this issue on the asserted applicability of the rule of practical construction may be disposed of by a consideration [158] of the law and the controlling evidence concerning that issue. The proper

application of that rule presupposes the existence of two necessary conditions, namely, ambiguous or uncertain contract provisions, and a long course of explanatory conduct thereunder by the parties. Lowrey v. Hawaii, 206 U. S. 206; Insurance Co. v. Dutcher, 95 U. S. 269. But here those conditions are not present. The contract provisions in question, as above pointed out, are not ambiguous or uncertain; and the conduct of defendant respecting other contract performance advanced by plaintiff to aid construction of those provisions was not a long course of conduct, but was with reference to certain contracts performed by defendant within and during a relatively short period after the same strike which is involved in this case. Defendant's course of inaction as to the contracts in suit was for about the same period or less, during which time as to which contracts defendant did nothing and acquiesced in nothing done by plaintiff inconsistent with defendant's delivery delay option or present position. Under that option defendant had the privilege for thirty days after the strike to deliver or not as it saw fit, without incurring liability for the consequences of not, during the life of the option, disavowing intention to exercise it. In that, there is no basis for estoppel by inconsistent conduct.

This case, therefore, is not one for the proper application of the rule of practical construction of contract by the conduct of the parties. Amherst Inv. Co. v. Meacham, 69 Wash. 284; Lesamis v.

Greenberg, 225 Fed. 449; Brown & Sons Lumber Co. v. L. & N. R. R. Co., 82 F.(2d) 94; In re Chicago & E. I. Ry. Co., 94 F.(2d) 297. [159]

The decision of this court is that plaintiff take nothing by its complaint and that the action be dismissed, with costs to defendant. Findings, conclusions and judgment may be settled upon notice or stipulation.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Feb. 8, 1939. [160]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on for trial on the 4th day of October, 1938, before the above entitled court sitting without a jury, and the plaintiff appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe and J. Gordon Gose, its attorneys, and evidence having been introduced on behalf of both plaintiff and defendant, and both parties having rested, and the Court having thereafter filed its written decision in favor of the defendant and against the plaintiff, Now Therefore, the Court does hereby make and enter the following Findings of Fact:

I.

The plaintiff is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the State of Oregon, and having for its principal business the purchase and sale, for export, of lumber and lumber products. [161]

II.

The defendant is now and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its principal office and place of business at Aberdeen, Washington.

III.

On or about September 1, 1936, the plaintiff and the defendant entered into a written contract dated September 1, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the plaintiff, 500,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $14.25 per M. feet, including freight charge to point of destination, for shipment during the month of October, 1936, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, to Tsingtau, China, which written contract was admitted in evidence as part of plaintiff's Exhibit 1

on the trial of this cause and bears Seller's No. S4545 Amended, and Buyer's No. CX-532.

IV.

On or about October 28, 1936, the defendant shipped and delivered, 249,141 feet of the logs covered by said contract, for which plaintiff paid the defendant. On October 29, 1936, a strike of longshoremen commenced in all seaports of the Pacific Coast of the United States of America, and continued without interruption up to and including February 5, 1937, and that during the period while said strike was in effect it was impossible for the defendant to make, or for the plaintiff to accept shipment or [162] delivery of any of the remaining logs which, according to the terms of said contract were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery. The defendant did, however, on or about April 2, 1937, offer to enter into a new contract to sell, ship and deliver to plaintiff, at a price of $16.75 per M. board feet, logs of the same quantity and quality as those which were not shipped or delivered under the contract dated September 1, 1936, and plaintiff accepted this offer upon the condition that in so doing, any rights of either party under the contract dated September 1, 1936, should not be in any way prejudiced or im-

paired. Accordingly, a new written contract subject to the terms of such offer and acceptance, was entered into by plaintiff and defendant on or about April 6, 1937, which new written contract was dated April 6, 1937, and was admitted in evidence on the trial of this cause as a part of plaintiff's Exhibit 1. In complete performance of this new contract, defendant shipped and delivered to the plaintiff 253,-751 feet, Brereton Scale, of logs, for which plaintiff paid defendant at the rate of $16.75 per M. feet, and in so doing plaintiff paid $634.38 more than it would have been obligated to pay for such logs under the terms of the original contract dated September 1, 1936.

V.

On or about September 4, 1936, the plaintiff and defendant entered into a written contract dated September 4, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the [163] plaintiff, 1,000,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock logs of Camp Run Export Grades, at a price of $13.75 per M. feet, including freight charge to point of destination, for shipment 500,000 feet, October/November, 1936, at seller's option, and 500,000 feet, November/December, 1936, at seller's option, from Grays Harbor and/or Willapa Harbor in the State of Washington, at seller's option, to Shanghai, China, which written contract was admitted in evidence as plaintiff's Exhibit 2 on the trial of this

cause, and bears Seller's No. S4566, and Buyer's No. CX-510.

VI.

On or about October 5, 1936, defendant shipped and delivered 502,635 feet of the logs covered by said contract, for which plaintiff paid the defendant. During the period while the strike of longshoremen, hereinbefore mentioned, was in effect, that is, from October 29, 1936, to February 5, 1937, it was impossible for the defendant to make, or for the plaintiff to accept shipment or delivery of any of the remaining logs which, according to the terms of said contract dated September 4, 1936, were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery.

VII.

Following such refusal of the defendant to make further deliveries under the said contract bearing date of September 4, 1936, plaintiff purchased in the open market, and at the best price obtainable, 430,084 feet, Brereton Scale, of logs [164] of the kind and quality covered by said contract, at a cost which was $5,376.05 in excess of the amount which plaintiff would have had to pay to defendant for such logs according to the terms of said contract.

VIII.

On or about September 28, 1936, the plaintiff and defendant entered into four written contracts dated September 28, 1936, under the terms of which the plaintiff agreed to buy from the defendant, and the defendant agreed to sell to the plaintiff 1,700,000 feet, board measure, Brereton Scale, 10% more or less, at seller's option, Pacific Hemlock Logs, of Camp Run Export Grades, at a price of $14.00 per M. feet, including freight charge to point of destination, for shipment 200,000 feet October/November, 1936, at seller's option, 500,000 feet December, 1936, 500,000 feet January, 1937, and 500,000 feet February, 1937, from Grays Harbor and/or Willapa Harbor in the State of Washington at seller's option, to Shanghai, China, which written contracts were admitted in evidence as plaintiff's Exhibits 3, 4, 5 and 6 respectively on the trial of this cause, and bear Seller's Nos. S4609#1, S4609#2, S4609#3, and S4609#4, and Buyer's Nos. CX-550, CX-547, CX-548 and CX-549 respectively.

IX.

On or about October 28, 1936, defendant shipped and delivered 170,384 feet of the logs covered by said contracts, and on or about March 4, 1937, shipped and delivered 494,176 feet of the logs covered by said contracts, or a total of 664,560 feet, for which plaintiff paid the defendant. During the period while the strike of longshoremen, hereinbefore mentioned, was in effect, that is, from October

29, 1936, to February 5, 1937, it was impossible for the defendant to [165] make, or for the plaintiff to accept shipment or delivery of any of the remaining logs which, according to the terms of said contracts dated September 28, 1936, were to be sold. Following the cessation of said strike, the plaintiff demanded that defendant make shipment and delivery of the quantity of logs which had not been shipped and delivered under said contract, but the defendant then refused to make such shipment or delivery, except the said shipment and delivery made on March 4, 1937, in performance of its agreement under said contracts to deliver half a million feet, 10% more or less, during February, 1937.

X.

Following such refusal of the defendant to make further deliveries under the said contracts bearing date of September 28, 1936, plaintiff purchased in the open market, and at the best price obtainable, 919,325 feet, Brereton Scale, of logs of the kind and quality covered by said contracts, at a cost which was $11,261.74 in excess of the amount which plaintiff would have had to pay to defendant for such logs according to the terms of said contracts.

XI.

All of the contracts sued upon contain the following terms and provisions.

> "Delivery and/or shipment of material under this contract is subject to acts, requests or com-

mands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before [166] enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyer's and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

"In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyer's account, if it can be obtained.

"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

"This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America."

XII.

All of the contracts sued upon embody the complete and final agreements of the parties and there are no collateral or oral agreements, either antecedent or subsequent, which in any way vary the terms of said written contracts.

XIII.

No trade custom or usage exists which is contrary to the provisions of said agreements or affects the interpretation of any part thereof, or which can be applied to vary or add to the terms of said written contracts, or which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired. [167]

XIV.

Neither the defendant alone, nor the defendant and plaintiff together, ever placed any practical construction upon any of the said contracts which would require the defendant to ship or deliver any logs after the time specified in said contracts for shipment or delivery thereof had expired.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,

Judge.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

The strike of longshoremen which commenced on October 29, 1936, and continued without interruption until February 5, 1937, was a strike of the character contemplated by the terms of each and all of the contracts sued upon herein, and permanently excused non-performance thereof by the defendant, as to all logs which by the terms of any of said contracts were to be shipped or delivered during the period while said strike was in effect.

II.

Upon the cessation of said strike of longshoremen, the defendant was under no obligation to sell, ship or deliver to plaintiff any logs which, under the terms of said contracts or any of them, were to be shipped or delivered during the months of Octo-

ber, November and December, 1936, and January, 1937. [168]

III.

Judgment should be entered herein denying relief to plaintiff and granting judgment in favor of defendant for its costs and disbursements to be taxed herein.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

Presented by:
J. GORDON GOSE.

Approved as to form.
BAYLEY & CROSON.

[Endorsed]: Filed Mar. 2, 1939. [169]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21137.

DANT & RUSSELL, INC., a corporation,
Plaintiff,

vs.

GRAYS HARBOR EXPORTATION COMPANY, INC., a corporation,
Defendant.

JUDGMENT

The above entitled cause having come on for trial on the 4th day of October, 1938, before the above

entitled court sitting without a jury, and the plaintiff appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and the defendant appearing by McMicken, Rupp & Schweppe and J. Gordon Gose, its attorneys, and evidence having been introduced on behalf of both plaintiff and defendant, and both parties having rested, and the Court having thereafter filed its written decision in favor of defendant and against the plaintiff, and having made and entered Findings of Fact and Conclusions of Law, Now Therefore, in conformity with said Findings of Fact and Conclusions of Law, It Is Hereby Ordered and Adjudged that plaintiff take nothing by reason of its complaint herein, and that said complaint be and the same hereby is dismissed, and that the defendant have and recover judgment against plaintiff for its costs and disbursements herein in the sum of $125.02.

Done in open court this 2nd day of March, 1939.

JOHN C. BOWEN,

Judge.

Presented by:

J. GORDON GOSE.

Approved as to form.

BAYLEY & CROSON.

[Endorsed]: Filed Mar. 2, 1939. [169½]

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Comes now Dant & Russell, Inc., plaintiff in the above entitled action, appearing by Bayley & Croson and Allen H. McCurtain, its attorneys, and excepts to the Findings of Fact made and entered by the Court herein as follows:

I.

Excepts to Paragraphs XII, XIII, and XIV of said Findings of Fact on the ground and for the reason that said Findings of Fact are not supported by the evidence before the Court.

And said plaintiff further excepts to the Conclusions of Law made and entered by the Court as follows:

I.

Excepts to Paragraphs I, II and III thereof on the ground and for the reason that said Conclusions of Law are not supported by the evidence in the above entitled cause and the law applicable thereto.

And said plaintiff further excepts to the Judgment of the Court entered herein on the ground and for the reason that said Judgment is not supported by the evidence and the law applicable thereto.

[170]

BAYLEY & CROSON
ALLEN H. McCURTAIN

Foregoing exceptions allowed this 2nd day of March, 1939.

JOHN C. BOWEN,
Judge.

Presented by:
FRANK S. BAYLEY, JR.

[Endorsed]: Filed Mar. 2, 1939. [171]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dant & Russell, Inc., a corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 2nd day of March, 1939.

Dated this 24th day of April, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellants,
Dant & Russell, Inc.

Address: 900 Insurance Building,
Seattle, Washington.

[Endorsed]: Filed Apr. 24, 1939. [201]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Dant & Russell, Inc., as Principal, and United Pacific Insurance Company, as Surety, acknowledge ourselves to be jointly indebted to Grays

Harbor Exportation Company, appellee in the above cause, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that, Whereas, on the 2nd day of March, A. D. 1939, in the District Court of the United States for the Western District of Washington, in a suit depending in that court, wherein Dant & Russell, Inc., was plaintiff and Grays Harbor Exportation Company, Inc., was defendant numbered on the Civil Docket as No. 21137, a judgment was rendered against the said plaintiff and the said plaintiff having filed in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the .... day of ...., A. D. 1939, next.

Now the Condition of the Above Obligation Is Such, that if the said plaintiff shall prosecute its appeal to effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

[Seal] DANT & RUSSELL, INC.,
By R. J. DARLING,
Principal, Vice Pres.,
UNITED PACIFIC
INSURANC COMPANY.
By: JOE PRICE,
JOE PRICE,
Attorney-in-fact.

Bond Book Vol. 4, page 55.

[Endorsed]: Filed Apr. 24, 1939. [202]

[Title of District Court and Cause.]

STIPULATION AS TO THE CONTENTS OF TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the transcript of record to be filed in the Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal taken herein, shall include the following:

1. Complaint at Law, except exhibits attached thereto;
2. Answer.
3. Demurrer;
4. Order Overruling Demurrer;
5. Reply to First Affirmative Defense;
6. Transcript of Testimony;
7. Decision After Trial;
8. Findings of Fact and Conclusions of Law;
9. Judgment;
10. Exceptions to Findings of Fact and Conclusions of Law and Judgment;
11. Part of Plaintiff's Exhibit I, being contracts dated September 1, 1936 and April 6, 1937;
12. Plaintiff's Exhibit XI; [203]
13. Part of Plaintiff's Exhibit XII, being Paragraph "L", entitled "General Conditions" of contract form of Douglas Fir Exploitation and Export Company;
14. Notice of Appeal, filed April 24, 1939;

15. Stipulation as to Contents of Transcript of Record;

16. Bond;

Dated this 15th day of May, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Complainant.
McMICKEN, RUPP & SCHWEPPE,
Attorneys for Defendant.

[Endorsed]: Filed May 16, 1939. [204]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 204, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the

record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 545 folios at .05¢	$27.25
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
TOTAL:	$32.75

I hereby certify that the above cost for preparing and certifying record, amounting to $32.75 has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 29th day of May, 1939.

[Seal] ELMER DOVER,

Clerk of the United States District Court for the Western District of Washington.

By: ELMO BELL,

Deputy.

[Endorsed]: No. 9196. United States Circuit Court of Appeals for the Ninth Circuit. Dant & Russell, Inc., a Corporation, Appellant, vs. Grays Harbor Exportation Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed, May 31, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

.... Term

No. 9196.

DANT & RUSSELL, INC., a corporation,

Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a corporation,

Appellee.

APPELLANT'S STATEMENTS OF POINTS UPON WHICH IT INTENDS TO RELY

Comes now the appellant herein, Dant & Russell, Inc., and states that the points upon which it intends to rely in this court and case, are as follows:

I.

The contracts sued on, by their terms, bound the appellee (seller) to ship, and the appellant (buyer) to accept, the merchandise contracted for, at the price and on the terms stated, and in the event of a delay in, or failure of, shipment occasioned by any of the causes enumerated in the contracts other than war, bound each party to performance within a reasonable time after the cause of delay was removed, unless the delay, caused by the impediment, was of unreasonable duration.

II.

Unless it be held that the contracts sued upon, intentionally exclude the usages and customs of the trade, with regard to the effect of contemplated impediments to performance, such usages and customs are necessary to their interpretation, and the court should have permitted evidence thereof to be received.

Respectfully submitted,
BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellant.

Copy received 5/18/39.
McMICKEN, RUPP &
SCHWEPPE,
Attorneys for Appellee.

[Endorsed]: Filed May 31, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO DESIGNATION OF THE PARTS OF RECORD NECESSARY TO A CONSIDERATION OF POINTS ON APPEAL.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the entire record as filed herein is necessary for the consideration of the above appeal.

Dated this 18 day of May, 1939.

BAYLEY & CROSON,
ALLEN H. McCURTAIN,
Attorneys for Appellant.

McMICKEN, RUPP & SCHWEPPE,
Attorneys for Appellee.

[Endorsed]: Filed May 31, 1939. Paul P. O'Brien, Clerk.

No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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BAYLEY & CROSON,
ALLEN H. McCURTAIN,
M. N. EBEN,
Attorneys for Appellant.

FILED

JUL 2 6 1939

PAUL P. O'BRIEN,
CLERK

FILHAM STATIONERY & PRINTING CO., PORTLAND, ORE

No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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BAYLEY & CROSON,
ALLEN H. McCURTAIN,
M. N. EBEN,
Attorneys for Appellant.

KILHAM STATIONERY & PRINTING CO., PORTLAND, ORE.

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No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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JURISDICTION OF DISTRICT COURT

I—Judicial Code, Sec. 24, and U. S. Code Ann. Title 28, Sec. 41, Sub. 1, is believed to sustain jurisdiction.

II—The basis for jurisdiction of the District Court of the United States for the Western District of ~~Oregon~~ Washington, Northern Division, in this case, rests upon the filing of the complaint in said court in which there is pleaded: (a) Diversity

of citizenship between plaintiff and defendant, Transcript of Record, Page 2, Paragraphs First and Second, plaintiff being an Oregon corporation and defendant being a Washington corporation, and (b) Three causes of action involving a total amount in controversy in excess of $3,000.00, to wit: in the amount of $17,272.17, exclusive of interest and costs. Transcript of Record, Page 4, Paragraph Fifth; Page 5, Paragraph Fourth; Page 8, Paragraph Fourth; Page 8, Prayer of Complaint.

JURISDICTION OF CIRCUIT COURT OF APPEALS

1—Judicial Code, Sec. 128, and U. S. Code Ann. Title 28, Sec. 225, is believed to sustain jurisdiction. It is further believed all appellant jurisdictional requirements have been met by the timely filing of notice of appeal. Transcript of Record, Page 216. Cost Bond on Appeal, TR. Pages 216 and 217, and original transcript of record on appeal properly certified to by the clerk of the trial court.

STATEMENT OF CASE

The principal business of complainant-appellant is the purchase and sale, for export, of lumber and lumber products; an allegation in the complaint to that effect stands admitted. Tr. p. 2, Paragraph First.

The defendant-appellee is the export representative of a large number of Washington mills.

A series of contracts was entered into between the parties, by the terms of which defendant-

appellee, as seller, agreed to sell, and the complainant-appellant, as buyer, agreed to buy, considerable quantities of Pacific Hemlock logs. Copies of these contracts are attached as exhibits to the complaint. Their execution by the parties is admitted. The contracts were drawn by the defendant-appellee.

The first contract, dated September 1, 1936, covered 500,000 feet of logs at $14.25 per M. Cost and Freight to be paid by seller. Shipment October from Grays Harbor/Willapa Harbor, seller's option to Tsingtau, China. This contract was attached to the complaint as Exhibit "A," and was admitted in evidence as complainant's Exhibit 1, Tr. p. 44.

The remainder of the contracts sued upon are practically identical, with the above mentioned complainant's Exhibit 1, with the exception of the dates for shipment, footage and delivery prices. As to dates of shipment, the remaining contracts, with the exception of the last two thereof, all provide for shipment at various times between October and the end of December, 1936. The last two of the contracts, being more particularly pleaded and described in Paragraph Second of complainant's third cause of action, Tr. p. 6 and 7, being Nos. S-4609#3, which called for shipment of 500,000 feet in January, 1937, and S-4609#4, which called for shipment of 500,000 feet in February, 1937.

The seller-appellee only partially performed said contracts, and as a result, complainant was obliged to obtain the balance of logs covered by the contracts in suit, from other persons and at an increased cost to it of $17,272.17, and this action was brought to recover such damage. It is admitted by appellee that, if complainant-appellant is entitled to recover at all, it is entitled to recover the full sum claimed. Tr. p. 55, last paragraph, to and including Tr. p. 56.

The contracts sued upon contained identical "General Conditions" clauses as follows:

> "General Conditions:
>
> "Delivery and/or shipment of material under this contract is subject to acts, requests, or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually coveral by insurance or excepted in bills of lading, or for outturn. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes,

if so required by the seler, providled the delay does not exceed thirty days. The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the accounts and risk of the buyers.

"In the event of war affecting this contract, the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.

"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.

"This contract is to be governed by the laws of the State of Washington, U. S. A., so far as applicable, and otherwise by the laws of the United States of America."

To the appellant's complaint, the defendant-appellee filed an answer, Tr. p. 9, affirmatively setting up the existence of a longshoremen's strike beginning October 28, 1936, and continuing, without interruption, to and including February 5, 1937, and that, by reason of such strike, it was impossible to perform the contracts sued on during the period of shipment agreed upon in said contracts.

To appellee's answer, appellant filed a demurrer, Tr. p. 15 and 16, prior to the effective date of the new rules of civil procedure, contending that the answer failed to set forth facts sufficient to constitute a defense.

Thereafter, an order was entered overruling appellant's demurrer to the affirmative answer, Tr. p. 16 and 17, to which order an exception was taken and allowed, Tr. p. 17.

Complainant-appellant thereupon filed a reply, Tr. p. 17, admitting the strike, but denying impossibility of performance during the period of shipment agreed upon in said contracts, and alleging that performance as to unfilled portions of contracts was possible within 30 days after cessation of the strike.

Complainant further alleged, as a first affirmative reply, that by the terms of the contract, the seller was obliged to ship and perform within a reasonable time after the cessation of the strike, and that it could have completed performance within 30 days, or within a reasonable time after such cessation.

For a second affirmative reply, complainant alleged the existence of a general custom and usage in the lumber and export trade, in the trade area here involved, under which clauses similar to the "General Conditions" clause involved in this

case, are construed to require a seller to ship at the option of the buyer within a reasonable time after the impediment of a strike is removed, and that it was within the power of the seller to have completely fulfilled its contracts within a reasonable time, and within 30 days after the strike ended.

A trial was thereupon had by the court, which resulted in Findings of Fact and Conclusions of Law, Tr. p. 203, to and including p. 213, and a Judgment, Tr. p. 213 and 214, adverse to the complainant. Hence, this appeal.

QUESTIONS INVOLVED

A—The question first presented is, whether or not the appellee-seller is permanently excused from performance under its contracts by the happening of a strike lasting until February 5, 1937, which date is after the date specified in the contracts for shipment. This question is raised both by appellant's demurrer to appellee's separate answer, Tr. p. 15, and the order overruling same, Tr. p. 16, and by the trial court's conclusions of law, Tr. p. 212, paragraphs First, Second and Third, and the Judgment, Tr. p. 213 and 214, and appellant's exceptions thereto, Tr. p. 215 and 216.

B—A further question concerns the limitations imposed upon appellant in its attempt to prove custom and usage of the export trade regarding

shipment and delivery of merchandise contracted for, after the termination of a contemplated impediment to its performance, it being contended by the appellant that, at the time the contracts were made, there existed in the trade such a generally known usage and custom, and that, upon the failure of the contracts in dispute to expressly, or by necessary implication, abrogate such custom and usage, they became necessary adjuncts to a proper interpretation of the contracts.

These questions were raised by the refusal of the District Court to permit evidence of custom and usage to be received; more particularly found in the transcript of record on pages 85 and 86, and at pages 101 to 104, inclusive, and at page 107, and at pages 128 to 131, inclusive, and at pages 140 and 141, and further by Paragraphs First, Second and Third of the Conclusions of Law found by the trial court, Tr. p. 212 and 213, together also, with Paragraphs Twelve and Thirteen of the Findings of Fact, Tr. p. 211, and to the judgment, Tr. p. 213 and 214, to which exceptions were allowed by the court, as more particularly appears at p. 215 and 216 of the Transcript of Record.

SPECIFICATION OF ERRORS

A—The court erred in rejecting or limiting testimony of appellant in support of its contention as to custom and usage, as follows:

SPECIFICATION No. 1

In sustaining an objection by appellee to a question propounded by appellant to the witness, A. S. Penketh, as to what the custom and usage is concerning the construction to be placed upon the clauses contained in contracts between exporters, buyer and seller, for export shipment as to the meaning of, or construction of, a clause relieving the seller from the liability to ship during the period of strike or other like impediment to the shipment, Tr. p. 85 and 86.

Grounds for Objection, Tr. p. 86:

The appellee urged, as grounds for its objection, Tr. p. 86:

(1) Such evidence was incompetent, irrelevant and immaterial;

(2) That it violated the parole evidence rule;

(3) That the contracts themselves necessarily controlled the rights, unless they were incomplete or doubtful.

(4) That evidence of this character could not be given unless the witness knew what the particular clause in question was between the parties.

The trial court sustained the objection on ground No. 4.

SPECIFICATION No. 2

In sustaining an objection by appellee to a ques-

tion propounded by appellant to the witness, R. J. Darling, as to whether or not there is a general custom relating to the construction of that (strike clauses) or similar clauses in contracts by exporters generally, Tr. p. 101 to 104.

Grounds for Objection, Tr. 101:

The same objections were raised as to Specification No. 1, with these additional:

(5) The contract provides that it contains the entire engagement between the parties.

(6) The question calls for a statement as to general custom without limiting it to the particular contract in question.

The court sustained the objection on the last above mentioned ground.

SPECIFICATION No. 3

In denying complainant the privilege of making an offer of proof as to what the general custom is as to this clause (strike clauses) or clauses of similar import and tenor, generally used in contracts throughout the trade, and in limiting the proof and privilege of making an offer of proof to the particular provision in the contract in issue, Tr. p. 107.

The offer was denied by the court on its own motion, on the ground that custom as to other or similar contracts would be immaterial.

SPECIFICATION No. 4

In sustaining an objection to the proffered testimony of L. E. Force, to the effect that the entire output of 70 mills in the trade vicinity is marketed under a practically identically worded contract to the ones in issue, concerning which the construction contended for by complainant (that is, that performance be required after the removal of an impediment, such as a strike) is the rule, and in refusing to permit complainant to show this in support of its claimed custom and usage, Tr. p. 128 to the bottom of page 131.

On the court's own motion, complainant's offer of proof here was restricted to custom with regard to the identical contract in issue.

SPECIFICATION No. 5

In sustaining an objection to a question propounded to the witness, Charles E. Dant, by appellant as to whether there is a custom generally in the export trade, that clauses, such as the clauses disclosed by plaintiff's Exhibits 1 and 12, Tr. p. 44, and Tr. p. 121, and providing generally that the deliveries are subject to and conditioned upon no liability against the seller by reason of the acts enumerated in those and similar clauses, where strict performance at the time specified in the contract is prevented or rendered impossible by reason of strike or other enumerated causes, whether there is not, under such contracts, a gen-

eral trade custom and practice, well known and understood throughout the trade generally, not only in the Northwest, but on the Pacific Coast and throughout the world, that such clauses, whatever may be their particular wording, are generally, under the custom, construed to mean that the seller is obligated to deliver within a reasonable time after the removal of the impediment, or the cessation of the strike, if that be the cause, Tr., last paragraph on page 140 to recross-examination, page 141.

To this inquiry, the appellee made "the same objection that I previously made," and the trial court sustained such objection.

B The court erred in making, as its finding of fact:

SPECIFICATION No. 6

The finding No. 12, Tr. p. 211, that the contracts sued upon embodied the complete and final agreement of the parties, and there are no collateral or oral agreements, either antecedent or subsequent, which in any way vary the terms of said written contracts.

SPECIFICATION No. 7

The finding of fact No. 13, Tr. p. 211, that no trade custom or usage exists which is contrary to the provisions of the contracts, or affects the interpretation of any part thereof, or which can be

applied to vary or add to the terms of said written contracts, or which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired.

It is contended by appellant that Findings Nos. 12 and 13 under Specifications 6 and 7 are erroneous in that there is undisputed testimony of custom and usage in the record as to the general construction in the trade of the identical "General Conditions" clauses involved in the contracts in issue.

> Testimony, A. S. Penketh, beginning at the last question by Mr. McCurtain on page 87 of the Transcript of Record, to and including the remainder of the witness's direct examination on page 89.
>
> Testimony of R. J. Darling, beginning with the second question by Mr. McCurtain on page 104, Transcript of Record, and continuing through page 106;
>
> Testimony of Charles E. Dant, beginning with the first question by Mr. McCurtain on page 134, Transcript of Record, and continuing through the answer to the second question on page 138.

C The court erred in making as its conclusions of law, Tr. p. 212 and 213:

SPECIFICATION No. 8

The conclusion that the strike permanently excused nonperformance of the contract by appel-

lee, as to all logs which, by the terms of any of said contracts, were to be shipped or delivered during the period while said strike was in effect, Tr. p. 212.

SPECIFICATION No. 9

The conclusion that, upon the cessation of the strike of longshoremen, the appellee was under no obligation to sell, ship, or deliver to appellant any logs which, under the terms of said contracts, were to be shipped or delivered during the months of October, November, and December, 1936, and January, 1937, Tr. p. 212 and 213.

SPECIFICATION No. 10

The finding of fact No. 13 may also be construed as constituting a conclusion of law, to the effect that no trade custom or usage exists which required the defendant to ship or deliver any logs after the time specified in said written contracts for shipment or delivery thereof had expired. It is objectionable as stating an improper conclusion.

SPECIFICATION No. 11

The conclusion that judgment should be entered in favor of the defendant, denying plaintiff relief, Tr. p. 213.

It is contended by appellant that all of the conclusions are erroneous in that the strike is accorded the effect of completely and permanently abrogating the contracts as to all unperformed

portions thereof; whereas, the true rule is that the strike only removed any time essence feature of the contracts which relieved the seller from the liability to buyer for delays occasioned thereby, necessitating complete performance by the seller within a reasonable time after the cessation of the strike. This rule results not only from the correct interpretation of the contracts themselves, but from custom and usage applicable thereto.

SPECIFICATION No. 12

D The court erred in overruling complainant's demurrer to appellee's affirmative answer and defense, Tr. p. 15 and 16.

To this objection, the same contention is advanced by appellee as is advanced to Specifications 8, 9, 10 and 11.

SPECIFICATION No. 13

E The court erred in entering judgment in favor of defendant and against the appellant, Tr. p. 213 and 214.

ARGUMENT

The argument logically divides itself into two main headings, as follows:

A Interpretation and construction ~~of construction~~ of contracts, under which Specifications of Error Nos. 8, 9, 10, 11, 12 and 13 will be discussed.

B Custom and usage, under which Speci-

fications of Error Nos. 1, 2, 3, 4, 5, 6 and 7 will be discussed.

Specifications of Error Nos. 8, 9, 10, 11 and 13 also concern the failure of the court to have given effect to the testimony and rule regarding custom and usage, and these matters will be treated under the above subdivision "B."

A. INTERPRETATION AND CONSTRUCTION

To properly interpret this contract requires, figuratively speaking, as nearly as possible, that we sit in the same chairs, and around the same conference table, with the parties at the time it was drafted.

The buyer and the seller in the instant case had been, for many years, and now are, actively engaged in buying and selling logs and lumber products for export shipment. At the time they made their contract, they knew, or are charged with notice by law, that one contracting to perform an act must perform that act as agreed, or respond in damages for his failure to perform, and so the seller knew that, if it agreed to sell and deliver, freight prepaid, the merchandise herein involved, it was bound to make good its undertaking.

13 C. J. p. 635, Section 706:

> "The general rule is that, where a person by his contract charges himself with an obligation possible to be performed, he must

perform it, unless its performance is rendered impossible by the act of God, by the law, or by the other party, it being the rule that in case the party desires to be excused from performance in the event of contingencies arising, *it is his duty to provide therefor in his contract.*"

(Italics ours.)

Both the seller and the buyer knew that there were certain hazards connected with the export trade. They knew what these hazards were. They had, a short time previous to the execution of these contracts, been through an 82-day strike tie-up of dock facilities on the Pacific Coast. Their vast experience over many preceding years had taught them there were other dangers as well to be considered in contracting their absolute liability to perform.

As a result of this knowledge, the seller had drafted, and prepared for its use, a printed form of contract which, in its judgment, was sufficient to cover all conditions likely to arise, and concerning which it required protection.

It was considered that there might be acts of government impeding performance. There might be acts of God, war, civil commotions, destruction of mill, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, strikes, lockouts, or labor disturbances, quarantine, or non-arrival at its due date at loading port of a ship, or for any other cause whatsoever, beyond the seller's control.

So they inserted, in their contract, a clause under the heading "General Conditions," which they, in their experience as sellers, deemed necessary for their protection. The seller was responsible for the wording of the provisions adopted, and the buyer, in accepting the contract, of course accepted it subject to the reasonable intendements of the "General Conditions" clause.

Without, for the moment, considering the effect of the particular clauses affording protection to the seller upon the happening of any of these events, it may be well to note that the seller's liability for failure to perform is the full and complete damage suffered by the buyer, including damages for delay, if the contract be interpreted as one in which time is of the essence. That this is such a contract, has been repeatedly urged by the seller.

After arriving at the conclusion that it, the seller, needed protection upon the happening of these or any one of these various events, it must naturally have next asked itself: What measure of protection, or what must be its privilege, when these things happened? One possibility stood out clearly in the seller's mind, and this was the possibility of war. And so it said, "in the event of war affecting this contract, the seller has the right of cancellation * * *." This the seller must have felt was the contingency upon which it required the maximum of protection, that is, the right to cancel the agreement, and it so provided.

It must then have considered delays, of various periods of duration, and for various causes.

It cannot be sensibly contended that the contract is at an end immediately upon the happening of any of the impediments named. To so hold would be to reduce the interpretation to an absurdity, wherein it could be contended that a snowstorm, or fog, holding up the seller's facilities for one hour, even before the last day of a month or two month period set for delivery, would defeat the seller's liability for performance. This is wholly unreasonable. Even the operation of war would not immediately cause the cancellation of a contract, but would only invest the seller *with the right to declare* a cancellation.

It is not the happening of the event causing the impediment itself, but its operative effect in causing a delay, or in causing non-delivery or non-shipment, which affects the contracts.

We know, at this point, that no liability is to be vested upon the seller for the delay of whatever duration it may be, provided only that it be caused by a strike or other enumerated cause and be beyond the seller's control.

If, as has always been contended by the seller, the contract should be construed as being one in which time is of the essence, that element (which in all events would have been for the *buyer's benefit, not* the seller's, and which could be waived by

the buyer) was effectively *removed from the contract* by the express provision thereof *excusing* delays and rendering the seller not liable *for delays.* The very use of the term "not liable for delays" imports the intention of a delayed performance, while excusing failure to perform on a given date.

Black on *Recission and Cancellation,* Vol. I, Section 217:

> "The general rule is that, although the agreement may specify a day for performance or payment, yet, if it is not expressly declared to be of the essence of the contract, or is not consistently so treated by the parties, mere delay or failure to pay or perform on the appointed day, will not be sufficient ground for rescission of the contract * * *. In any event, and on the strictest view of the rights of the parties, where time is not of the essence of a contract, the failure of the contractor to complete the work within the time specified, does not *ipso facto* dissolve or terminate the contract, but, at most, it gives the other party an election to rescind, and the contract continues in force, giving the first party an opportunity to complete his performance of it until the second party exercises his option to rescind, and gives distinct notice of it."

And again, Section 219:

> "Even where time is made the essence of the contract, this provision may be waived by the party for whose benefit or protection it is inserted, either expressly or by extending the time for payment or performance, or by

granting indulgence to the other party in this regard."

If, therefore, time was of the essence in these contracts, which we deny, it was only so in connection with any failure of performance, not caused by any of the enumerated impediments listed in the contract. There would seem to be no reason why the parties could not, in advance, remove a time essence feature upon the happening of certain contingencies. This was the very purpose of the delay clause.

Keeping in mind the absolute liability of the seller to perform, in the absence of contractual immunities, we must next inquire where in the contract is there any provision for relieving the seller from the necessity of ultimate performance? Is it supplied by the terms "non-shipment" and "non-delivery"? These terms are not synonymous with "delay."

The contract provides, "and the seller is not liable for delay or non-shipment or for delay or non-delivery if occasioned by an act of God * * * war * * * strikes * * * beyond the seller's control." What does this clause mean? In very simple language, it means that the seller is not required to do the impossible, and is not liable for failure to do it. It means that it cannot be held liable for *delays* beyond its control, but *that is a far cry from absolute termination of all liability* and *complete absolution from ultimate performance.*

There was a strike, and there were labor disturbances, not, however, in the seller's industry or mill. The strike occurred in an allied industry. It was a strike of longshoremen whose duty perhaps was the loading of the vessel from the dock. We believe it may be seriously contended that there was no impossibility or no delay beyond the seller's control as a result of the strike. If it be said that the existence of the strike caused a break-down of government to such an extent that loading of the vessels could not be done by non-union workmen, then perhaps one might be required to import such impossibility of performance as excusing delay. It is doubtful if the law will consider itself impotent to protect non-union laborers in the performance of the tasks by which they earn their bread and butter. True, a strike made necessary the obtaining of labor for loading through channels more burdensome than if loading were completed by union labor, but here was no impossibility. A greater burden, perhaps, but this has never operated as an excuse for a contractor.

Notwithstanding the foregoing, and admitting, for purposes of this discussion only, that it was impossible to deliver or ship at the express dates, we cannot be permitted to forget that this failure, so far as it related to express dates of shipment, was expressly excused.

Then, let us see if, with the time element feature removed, shipment or delivery was impossible.

Both the buyer and seller were still in business after the strike terminated. Logs were available and carriers and dock facilities were available. There was only a very nominal increase in freight rate of 87½c per M. No facilities were destroyed, nor was there any destruction of the subject matter of the contract.

One seems necessarily forced to the inescapable conclusion that non-shipment and non-delivery were not caused by the strike, and did not result from "any cause beyond seller's control," but were only caused, and only resulted, from the seller's own arbitrary choice—a choice voluntarily made by the seller to escape what, at that time, was a nominal increase in the cost of performance to it—an excuse for a reason which has never been sanctioned by the courts as relieving a seller from the necessity of performance.

13 C. J., page 636, Notes 16 to 45, inclusive:

> "Hence, performance is not excused by a subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expense, by danger, by inevitable accidents, by the breaking of machinery, by strikes, by sickness, by weather conditions, by financial stringency, or by stagnation of business periods, nor is performance to be excused by the fact that the contract turns out to be hard and improvident, or even foolish, or less profitable, or unexpectedly burdensome * * * the unlawful conduct or interference of a third person."

At this point, it should also be noted, that at no place in the record does it appear the seller could not have obtained carriers at the old rate, had it acted promptly upon the termination of the strike, and this it would have the burden of showing even if it be conceded, which it is not, that the increased cost of performance to it was a legal excuse for its failure to perform. It simply sat on its corporate haunches and hoped it would not get hurt.

In answer to the previous question, we say, most emphatically: "The provision for relieving the seller from the necessity of ultimate performance is not found in the use of the terms "non-shipment" and "non-delivery."

Is it then found elsewhere in the contract? The next provision for which much has been claimed by the seller is, "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed 30 days."

Expressly, this is nothing more than a provision by which the buyer in advance agrees to waive whatever right it might have to terminate the contract, if the seller should require it to waive it, on account of an impediment creating a delay up to 30 days. We ask the court, where is it an agreement, either expressly or by implication, that the buyer may not further waive, or further extend

the period of 30 days? It is a provision looking toward performance, and not in any sense excusing it, nor looking to complete frustration or cancellation.

The provisions regarding excuses came earlier in the contract. This clause is expressly in limitation of the buyer's privilege to claim a complete frustration of the undertaking because of a delay under 30 days. It is an implied recognition that a situation might occur wherein even 30 days' delay would, so far as the buyer is concerned, completely frustrate the agreement, and entitled it to cancellation. Such a condition might, under certain circumstances, result from a day's delay. In another, it might not result from a year's delay.

There might well have been, in the absence of this provision, such a complete frustration of the undertaking, as to amount to a destruction of the subject matter; where, for example, the parties have contracted in contemplation of the existence of a particular market for the buyer, and a strike of longshoremen imposed a 20-day delay, which cost the buyer this sole market. The buyer may not have been obliged to accept, and the seller would have been left with unsaleable merchandise on its hands. An example of this is treated by the court in the case of

> *Alfred Marks Realty Company vs. Hotel Hermitage Company,* 170 App. Div. 484, 156 N. Y. S. 179.

In that case, the defendant contracted for an advertisement in a program and souvenir of the International Yacht Races, agreeing to pay therefor on publication and delivery of the book, but the races were never held because of war. The court said the defendant was not liable as having failed to guard himself against a viz major, but the mutually contemplated object having failed, the plaintiff could not exact payment.

In the case at bar, such an interpretation or construction, in the absence of the 30-day provision, would have left the seller with merchandise on its hands, for which there was no market, and the buyer free of any obligation to take, and this is the condition the seller wished to guard against by the 30-day clause. Another example is treated in the case of

Mills vs. Stevens, 5 Pa. L. J. 513.

wherein parties made a contract in contemplation of the passage of legislative acts which were essential to the object of the contract. The legislative acts were not passed, and the court held that this defeated the contract, as it completely defeated the object of the parties in making the contract.

The seller, then, looking to its own problems, arising by virtue of the delay, decided it was amply protected by putting into the contract a provision requiring the buyer at its option to take

deliveries up to a 30-day delay, whether such a delay would have amounted to a complete frustration of the undertaking or not. The burden of this was to be on the buyer, not on the seller.

This clause exists in the contract solely in the interests of the seller, expressly covering a period of the first 30 days of delay. It does not purport to cover a period beyond 30 days, and cannot be stretched by implication to do it. It becomes an inoperative provision just as the phrase "restraint of princes" becomes inoperative where the facts do not fit.

Actually, the clause has no bearing upon the present controversy for the additional reason that the buyer is not being charged with a failure or refusal to accept under its requirement. We must again answer, "the provision for relieving the seller from the necessity of ultimate performance is not found in this part of the contract."

There remains only one other place to look for it—the last resort of lawyers, searching for that, of which even the makers of the contract never suspect the existence—the implied provision for cancellation.

13 C. J., Section 521, Notes 26 to 29, inclusive, provide:

> "In order that an unexpressed term may be implied, *the implication must arise from the language employed in the instrument, or be indispensable to effectuate the intention of*

> *the parties.* There can be no implication as against the express terms of the contract, and courts will be careful not to imply a term where the contract is intentionally silent, or which is against the intention of the parties as gathered from the whole instrument. *A term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term.*"
>
> (Italics ours.)

Since the cancellation provision in event of strike is not expressed in the contract, and the implication of cancellation does not "arise from the language employed," and is positively negatived by the hereinafter treated specific provision providing for cancellation in the event of war, we next inquire, "How is it indispensable to effectuate the intention of the parties?" Not the intention of one of the m, certainly, and, not the intention the court thinks they should have had, but the real thing as gathered from the contract itself.

What is its unquestioned purpose? Sale and shipment of the logs, and nothing else. The parties agree upon time for performance, but in fairness say, this is not to make the seller liable for delays caused by certain things, nor is it to be liable if these certain things absolutely prevent it from performing.

Here are expressed terms that have no need of implications. The same may be said for the 30-day clause. It expresses its own function. It looks

toward performance, not away from it. It should not be tortured into meaning something altogether different than it says. Even the seller didn't find the necessary provision implied from the so-called "30-day clause," *at the time it answered the complaint.* Its ingenious counsel found it only when a demurrer was interposed to an answer which claimed only benefits from the words "non-shipment" and "non-delivery."

Unless the interpretation contended for by appellee is a necessary one, it will not be indulged under this rule, and so, to the proposition of the implied provision, the answer must again be, "the additional provision relieving the seller from the requirement of ultimate performance cannot be found."

Something has been said of frustration, and the agreement of the parties expressly excusing delay. We would say, in passing, that we are not contending that all delays resulting from an excusable impediment, leave the seller bound to perform after th ecause of the delay is removed. We do, however, insist that, before an excused delay can operate to abrogate the contract, it must have existed for an unreasonable period of time. If this were not the rule, all contracts containing strike clauses would be abrogated upon the happening of a strike creating a 5-minute delay, or in case of a contract, worded as ours is worded, after a 5-minute delay caused by fog, or storm. If this were the intention of the seller, why didn't

the contract simply say, "It terminated at the seller's option if any of the enumerated events caused a delay." So much simpler. So much more direct. So much more intelligent and intelligible to the buyer who had no lawyer at its elbow to interpret its meaning.

We may then inquire, was the delay of so unreasonable duration, in the case at bar, as to abrogate the contract? The record is devoid of any correspondence or conversation between the parties during or subsequent to the strike, suggesting that the delay was of unreasonable duration. There was in fact nothing at all on the subject until long after the strike ended, and the buyer was inquiring when shipment would be made, Tr. p. 170.

During the cross-examination of Mr. Herber, general manager of the seller company, after much pressing, the following occurred. Question by Mr. McCurtain:

> "Let me phrase it this way, Mr. Herber. Is it not a fact that on March 18, long after you now say the contract was of no further effect, you declined in your office to commit yourself in writing on the proposition?
>
> "A. I did.
>
> "Q. That is to say, you did refuse to commit yourself?
>
> "A. I refused to commit myself."

Here, then, a month and a half after the strike

ended, at a meeting of the parties held for the purpose of discussing these contracts, the seller failed to suggest any unreasonable delay.

The parties had just experienced a longshoremen's strike two years previous to this one. It is a matter of common knowledge and the subject of judicial notice, that the 1934 longshoremen's strike lasted 82 days. The parties knew this when they contracted to excuse delays caused by strikes, in the present case. Their knowledge that the preceding strike lasted 82 days had a lot to do with interpreting their meaning here.

Is the present delay from the present same cause as in 1934 unreasonable within their contemplation, when the 1934 strike the last one in the shipping industry, lasted nearly as long? As longshoremen's strikes go, according to our recent experience, and among other things, this is what the buyer and seller were excusing, the delay caused by this one was not unreasonable.

The reasonableness or unreasonableness of the delay is nowhere treated in the contract with regard to termination. If the right to terminate exists, it must be found, not under a contract silent on the subject, but under the general law applicable to all contracts, and there are mighty few instances in which the courts have been willing to say, as a matter of law, that there was impossibility of performance such as would justify abrogation of a contract.

Reasonableness or unreasonableness of delay may have to do with the aforementioned doctrine of frustration, where a contract is made upon the mutual assumption that some future event will happen, or some present condition will continue, but it has no bearing in a case such as ours where the object to be accomplished was not, within the mutual contemplation of the parties—a condition precedent to the continuance of any contract, or a condition subsequent, upon the happening of which a contract might be abrogated.

Nor is there any impossibility of performance within the general rules laid down by the courts.

13 C. J., Section 712:

> "Where performance becomes impossible subsequent to the contract, the general rule is that the promissor is not therefore discharged."

To this proposition is cited an abundance of cases from 21 jurisdictions.

13 C. J., Section 715:

> "The general rule is that an absolute undertaking is not discharged by a subsequent act of God rendering performance onerous or even impossible."

The purport of the cases cited under this section is that, to relieve a promissor from the burden of responding in damages for his failure under even an act of God, there must be an element found in, or implied in, the contract.

If the seller would now contend the delay caused by the strike was unreasonably long, was he not under the duty to make such a contention at the first opportunity? How, in good conscience and good law, can a party to a contract which it prepared, and which is wholly imperfect in connection with the seller's contention of a cancellation privilege, be permitted to refuse to commit itself as to whether or not it would perform? We say that the contract, if it implies any privilege for cancellation short of war, it does so in such a doubtful and ambiguous manner as to not permit its draftsman to sit silent in the face of a fair, honest, business demand for interpretation, particularly at a time when the cost of inaction or delay was increasing.

In law, we would call the seller's contention of an unreasonably long delay, or its contention of impossibility of performance, or its contention of abrogation of the contract by the happening of a condition subsequent, an affirmative defense, and require that it be raised promptly. Since an affirmative defense is something the seller might or might not raise, as it chose, and the buyer was helpless before the seller's indecision, ought the seller now to be permitted to say what it didn't or wouldn't say sooner?

When the seller refused to make its decision under the condition of daily increasing rates, we say that it thereby waived the privilege of claiming either that the delay was unreasonable, or that

its imperfect contract gave it cancellation privileges, or that its so-called "30-day" clause meant more than it said.

> "He who fails to speak when conscience bids him speak, the law debars from speaking when conscience bids him remain silent."

The seller is estopped to say the delay was unreasonable, to which it has said in the past, and will probably say again, "Estoppel must be pleaded."

Estoppel never gives rise to a cause of action. It is only a defense to a cause of action, or a bar to a defense. The rule is that it need not be pleaded where there is no opportunity to plead it. The seller's answer did not present the opportunity to plead it in reply. The answer does not put appellant on notice that the seller is hurt by any unreasonable delay, or that the 30-day clause gives it any privileges, or that there is claimed impossibility of performance after the removal of the time element privilege by the strike. It simply says, we are not liable because our contracts say we are not liable, for non-shipment caused by strikes, and on account of the strike, we couldn't ship during the agreed periods. It pleads the strike as an absolute bar by reason of the non-shipment and non-delivery clauses in the contract. And so, within well-recognized rules of law, we are not barred from claiming an estoppel, against contentions not pleaded against us.

The foregoing conclusions and interpretations to be made of the contract at bar do not rest wholly in the logic of the appellant. The following cases are illustrative of the interpretations contended for:

> *Potter vs. Burrell,* The Law Reports, 1 Queen's Bench, 97.

In this case, five ships were due to arrive and load "as nearly as possible a steamer a month," between August and early December. "The dates at which the five vessels were to be due in New Caledonia * * * were mutually agreed between the parties." Two ships were particularly involved: The Strathairly was due September 23. It arrived October 8 or 9. The Strathairn was due October 10. It arrived October 12. The contract provided the charterers should begin to load within 24 hours after arrival. The contract further contained "the usual provisions excepting perils of the sea." All available labor was required to load the Strathairly which was completed October 23. The Strathairn thereupon began loading October 24. The court held that the failure of the Strathairly to arrive on its due date was caused by the perils of the sea, and that the owner, who was the other party to the contract, could recover demurrage from the charterers, and used this very appropriate language regarding delay:

> "It was arranged that the ships should arrive at certain specified dates * * *. Why, then, was the Strathairly late? Not by reason

> of any fault of the owner, but by reason of the perils of the sea. The truth is, she was not late according to the true meaning of the contract. She had arrived in time. As I have pointed out, September 23, the time named for her arrival, was not a fixed date but was an approximate date, and 'as nearly as possible' consistent with the perils of the sea. There was no breach of the contract, nor was there any breach or non-performance of any condition in her being late. She was there as contemplated by the parties to this charater. * * *"

and with the case at bar, we say that the term "not liable for delay" is the equivalent of the term "as nearly as possible consistent with perils of the sea," as used in the *Potter vs. Burrell* case, the delivery dates in our contracts not being inflexible within the true meaning of the contract.

Fish vs. Hamilton, 112 Fed. 742.

In this case, the contract provided for the shipment of certain sheetings. Delivery date was specified as December and January barring fire, strikes and other unavoidable casualties. A strike occurred in the mill where the goods were manufactured beginning in November, and ending in February. The defendant claimed the strike, and his inability to produce the goods during the period, terminated the contract, and refused to make delivery. We quote from the opinion of the Circuit Court of Appeals as follows:

> "The single question is whether the words 'barring fire, strikes and other unavoidable

casualties' affected the whole contract or merely the time of delivery * * *. If the parties had intended that this provision might void the whole contract, they would naturally have inserted it after the statement of agreement for purchase, or at the bottom of the note. We concur in the opinion of the court below that the provision affects the terms of delivery only, and that the seller was bound to deliver within a reasonable time after the termination of the strike."

Cotrell vs. Smokeless Fuel Company, 148 Fed. 594.

The case related to a contract for delivery of coal. The contract contained this clause:

"Deliveries of coal under this contract are subject to strikes, accidents, interruption of transportation, and other causes beyond the control of the party of the first part, which may delay or prevent shipment."

The court held, in conformity with our contention here, that non-shipment and non-delivery were not beyond the control of the seller, and that the defendant, in the Cottrell case, was only relieved from its obligation to the extent that the happening of the strike rendered it impossible to perform, refusing to apply the reasoning as contended for by appellee in our case, that the privilege of non-shipment was accorded by the delay.

Jackson Phosphate Company vs. Caraleigh Phosphate Company, 213 Fed. 743, C.C.A. Fourth Circuit.

Here was a contract to ship 2,000 tons of phosphate rock at the rate of 200 tons per week unless hindered or delayed by certain impediments. The justice reasoned as follows:

> "Inasmuch as this proviso was inserted and the defendant acquiesced in the same, we are forced to the conclusion that it was the intention of the parties that if the plaintiff was not delayed on account of causes mentioned, that the shipment should be made continuously until the entire amount was shipped, but if, on the other hand, there should be any delay caused by car shortage or bad weather, the plaintiff would be entitled to deliver the rock within a reasonable length of time after the car service had resumed its normal condition * * *. The proviso as to shipments, from the very nature of things, must have been intended to relate to the time of delivery, and we cannot understand the opinion of the theory that it could be construed to relate to the life of the contract."

This case further cites, with approval, the *Cotrell vs. Smokeless Fuel Company* case, *supra,* and *Fish vs. Hamilton, supra,* and see 35 Cyc. 249, as follows:

> "Where the contract provides that deliveries shall be subject to strikes, the existence of a strike merely suspends deliveries during the strike and does not terminate the contract, and the seller is therefore bound to resume deliveries after a reasonable length of time after the strike has ceased."

The court, in the Jackson Phosphate case, continued:

"Indeed, the rule is so well established that we do not deem it necessary to cite further authorities * * *. As we have stated, under this provision of the contract, the defendant could have required the plaintiff to make the balance of the shipment within a reasonable time. We think that such provision likewise inures to the benefit of the plaintiff and that, therefore, plaintiff was entitled to deliver the rock within a reasonable length of time after the cars were to be had, and that the effort of the defendant to cancel the contract, and its refusal to accept further deliveries under the same, entitles the plaintiff to recover the amount sued for in this action."

Here, then, is a reason stated by the court in a like case, which well illustrates the dangerous position of the buyer in the case at bar, who was unable to get a decision from the seller interpreting its contract.

Acme Manufacturing Company vs. Armenius Chemical Company, 265 Fed. 27.

In this case, the defendant sold 7,000 tons of sulphur pyrites. The contract contained a clause providing that it was made subject to delay or stoppage caused by strikes, accidents, etc., and it also provided that the plaintiff's right to demand pyrites expired January 1, 1917. The price of pyrites increased materially during the latter part of the year 1936, and pyrites were very scarce in 1917. The court quoted from 35 Cyc. 249, *supra,* and concluded by saying:

"This rule, we think, is well established."

Corona Coal Company vs. Hyams, 9 Fed., 2nd Edition, 361.

provided for the sale to plaintiff of 30,000 tons of coal, delivery 3,000 tons monthly. The contract contained a provision that deliveries were subject to delays on account of certain impediments. The court said:

> "We are of the opinion that defendant has not placed itself in the position to rely upon the clause excusing it for conditions beyond its control, because if it had acted in good faith, plaintiff would have received the coal to which it was entitled, not withstanding the strike and car sortage, and also because it was not the intention of the parties that a delay should terminate the contract but only that it should postpone time for delivery."

Street vs. Progresso, 50 Fed. 835.

In this case, there was a charter providing a vessel should proceed with all reasonable speed to Charleston, there to load a cargo of cotton for foreign shipment, and that should the steamer not arrive on or before October 1, the charterer had the option to cancel the contract. The contract contained a clause excepting strikes and other causes beyond the owner's control. A quarantine rendered it impossible for the vessel to dock at Charleston until more than a month after the October 1 date. The court said:

> "No canon of construction is more often resorted to than that the language used by the contracting parties must receive a reasonable construction expressive of the intent of the parties, and tending to promote the object in view * * * the transportation of the cotton was the object to be attained. Whether the transportation commenced October 1 or November 1, was not as material as that the cotton should be transported. This is evidenced by the fact that delay in arriving at the port of lading did not avoid the contract by its terms, but such avoidance for such cause lay solely in the discretion of the charterers."

The court continues:

> "Such delay, unless it be so expressly stipulated in the writing, never defeats a contract unless time be of its very essence, and then generally only at the option of the innocent party. Here it is clear neither party regarded time as of the essence of the contract."

And quoting the language of the District Court from which this appeal was made:

> "So long as the circumstances remained the same, the delay being no longer than might reasonably have been contemplated, the contract remained in force. The month which elapsed made no material change. The respondent was still engaged in carrying merchandise and able to keep her engagements. The libelant still had merchandise to carry."

But, whatever may be said concerning the language heretofore considered, to determine the intention of the parties, there is to be found in the

"General Conditions Clause," language conveniently overlooked by appellee's counsel, and ignored by the trial court, which, when considered in connection with the claim, that the parties intended delay by strike to terminate the contract, clearly negatives such contention.

It has been noted, that in the first paragraph of the "General Conditions Clause," there is enumerated some 18 different reasons for delay, the effect of one of which, a strike, is now claimed caused a cancellation, and among its 18 stated reasons, for delay or non-shipment, delay or non-delivery, is a condition anticipated by the parties, namely, war. If, as appellee's able counsel contends, and the learned District Judge held, the contracts were to be terminated because of, or by reason of, the happening of any one of the enumerated anticipated causes for delay, and by a fair interpretation under the language heretofore considered, why did the seller see fit to insert this additional language in the third paragraph of the "General Conditions Clause"?

> "In the event of *war* affecting this contract, the seller has the *right of cancellation* * * *."
> (Italics ours.)

Disregarding what is believed to be a logical analysis, showing the previously considered language can not be tortured into meaning the seller had the cancellation privileges claimed for it, it is believed the language of this subsequent clause,

definitely prohibits such construction. One does not add water to the already overflowing container. "He who stands on the pinnacle, can only step down." One does not paint the lily. If the seller had a contract which, by fair intendment from language already used, gave it the absolute right of cancellation, because of "Act of God * * * war * * * strike * * *" why add, "in the event of war affecting this contract, the seller has the right of cancellation"?

In logic and reason, the answer is, anti-~~legislation~~, the seller did not believe the previous provisions of the contract gave it the right of cancellation, and hence, singled out the one cause, and, clearly stated the one condition, under which it desired to reserve to itself, the right to cancel.

> "Nor all your piety, nor all your wit, can cancel out a single line, nor all your tears wash out a word of it."

B. CUSTOM AND USAGE

As was stated in the beginning of the discussion of general interpretation, we must again place ourselves in the position of the parties whose contracts are to be interpreted. It is stated in Volume I of the Restatement of the Law, on Contracts,

> Section 245: "Usage is a habitual or customary practice."

> Section 246: "Operative usages have the effect of (a) defining the meaning of the words of the agreement or the meaning of other

manifestations of intention, and (b) adding to the agreement or manifestation of intention provisions in accordance with the usage, and not inconsistent with the agreement or manifestations of intention."

Section 247: "A usage is operative upon parties to a transaction where and only where (c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage."

"Comment:

"(d) If the parties choose to exclude the application of usage by contracting upon different terms from those customary in the locality or in the occupation to which they belong, they may do so, and it is not necessary, in order to produce this result, that they should state in specific words that the usage is not adopted as part of the contract if they otherwise make their intention manifest."

Section 248: "(2) Where both parties to a transaction are engaged in the same occupation, or belong to the some group of persons, the usages of that occupation or group are operative, unless one of the parties knows, or has reason to know, that the other party has an inconsistent intention."

Section 249: "Usage cannot change a rule of law, but usage may so affect the meaning of a contract that a rule of law which would be applicable in the absence of usage becomes inapplicable."

Kriete vs. Myer, 61 Md. 558.

holding that the time of delivery of goods may be determined by usage.

Brown vs. Hicks, 8 Fed. 155.

This case stands for the rule that the usage is admissible to show that either party to a contract had a right to terminate the contract "for good cause." The corollary in our case would be that usage is admissible to show that neither party had a right to terminate the contract, or that the contract automatically died or lived as the case might be, for a reasonable time after an excusable failure of performance.

17 C. J. 499, Section 63.

> "Evidence of usage is allowed not only to explain but also to add tacitly implied incidents to the contract in addition to those which are actually expressed, and where a contract is not initself a complete expression of the intention of the parties, valid and known usages, if not inconsistent with the expressed terms, are admissible to supply matters as to which the contract is silent. Where a contract is clear and complete, new terms cannot be added by usage. Thus, usage is admissible to determine the proper mode of performance, as for example, to fix the method of weighing or measuring, or the place at which a certain thing is to be done, or the time when or within which an act is to be performed. So, also, it is admissible to show such matters as when the contract was intended to become effective, or how long it was intended to continue in force, or what amount of compensation was due thereunder."

17 C. J. 492.

> "Valid usages concerning the subject matter of a contract of which the parties are chargeable with knowledge, are by implication incorporated therein, unless expressly or impliedly excluded by its terms and are admissible in aid of its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary the contract, but upon the theory that the usage forms a part of the contract."

It is believed, therefore, that the court was in error in limiting admitted evidence, and in refusing to admit other evidence, of custom and usage not based solely upon the wording of the identical contract in issue. It is urged that the rules permit the application of the doctrine of custom and usage in connection with the present controversy in two respects:

> First: That known usages and customs were in the minds and consciousness of the buyer and seller when the contracts were made, and that they were, therefore, between parties engaged in the same industry, as much a part of the agreement as was any expressed term.

> Second: That usage and custom has imported a meaning in the trade to the general effect to be accorded not only the identical language used regarding impediments to performance, but the general language found in other contracts within the industry relating to the some subject matter.

Under the first subdivision, we have a situation

in which both parties are large and prominent operators in the export and lumber industry operating from practically the same base. It is inconceivable that they should not have had or been chargable with, the knowledge of customs and usages in the trade area in which they operated. It is likewise inconceivable that their contracts can be interpreted by the lay mind without bringing into play explanatory usages. It is seriously questioned whether the terminology of their contracts, the hieroglyphics, abbreviations and expressions used therein are wholly intelligible to a man not in the industry. It is like a doctor's prescription—wholly unintelligible to the lay reader. When they use their sign language, they are automatically giving force to the argument, that it is impossible to interpret such contract according to the intention of the parties, without investing it with meanings accorded it in the particular industry involved.

When the court restricted the evidence of custom and usage to that which had grown up under the identical contract in issue, it precluded from its consideration the vast background of the contracting parties, and of the industry in general, only by the aid of which can intelligence be imported into the agreement. The contract at bar was utterly silent as to its requirements and the effect of the parties undertaking, after the termination of an excusable delay. The fair rule would require and permit proof as to what is customarily done in the industry, not under an identically

worded contract, but under a contract identical in principle. By identical in principle, we mean by a contract which excused delays from certain causes.

This would bring us to the next logical step. Under the law, the usage would become a part of the contract unless expressly or by necessary implication excluded. We recall an earlier discussion in this brief on the subject of express or implied cancellation privileges upon the happening of an excused impediment to performance.

No clause is to be found in the contract excluding customs and usages. A careful analysis has failed to disclose anything which might negative the intention of the parties to have their contract interpreted in view of known usages and customs, except the section of the "General Conditions" clause following:

> "The terms of this contract are herein stated in their entirety and it is understood that there is no verbal contract or understanding governing it."

In answer to this proposition, we cite

> 1 *Greenleaf on Evidence,* Section 292, page 374:

> "The rule which forbits the admission of parole evidence to contradict or vary a written contract is not infringed by any evidence of known and established usage respecting the subject to which the contract relates."

If these usages are, as we contend, a part of the contract, then they are just as much a part thereof as they would be if typed out and inserted therein. They are not verbal understandings governing it.

Under the second subdivision of the usage and custom subject, a very brief mention of the testimony will be cited. The witness, Mr. Penketh, Tr. p. 85, was asked concerning a general custom to be placed upon clauses contained in contracts between exporters, buyer and seller, for export shipment, whether the meaning or construction of the clause relieved the seller from obligation to ship during a period of strike, or like impediment to the shipment, and on page 86, after having answered that there was a custom, the witness was prevented from testifying by the ruling of the court, on the ground that, necessarily, he could not give any evidence of this character, unless he knew what the particular clause in question was.

This ruling might be proper in a case where the sole purpose of the evidence is to construe certain words, but is wholly improper where the additional function of the testimony is to establish a known and uncontroverted custom and usage present in the minds of the parties at the time the particular clause involved was adopted.

Again, in the testimony of Mr. Darling, Tr. p. 101, Mr. Darling was prevented from answering as to whether there is or is not a general custom for the construction of that or similar clauses in

contracts by exporters generally, and the ground for the restraint imposed by the court was that testimony of general custom, not limited to the particular contract in question, was inadmissible. The court was fully advised of the position of counsel with regard to this contention, repeatedly, by Mr. McCurtain, the colloquy on the subject being found at Tr. p. 102 and 103.

At Tr. p. 107, counsel for appellant made an offer of proof to show the general custom in regard to the particular clause or clauses of similar import as the one involved in the contract at bar, and the court denied the offer. It is believed that in any event, whether the testimony was to be admitted or not, under a proper ruling, the offer of proof should have been permitted. This instance is cited, not in the hope of obtaining a reversal on account of what we now believe may have been an inadvertent ruling of the court, but only to excuse a technical failure to make the offer of proof.

It will be noted, throughout the record, on the subject of custom and usage, that the witnesses have generally answered, notwithstanding the objections, as to what the custom and usage was in the industry in generally, similarly worded contracts, and that the requirements of an offer of proof have been met by these answers, notwithstanding the fact that they have been finally limited or stricken, and the court knew, and the record full well discloses, what the witnesses would

have testified to had they been permitted to answer.

Again, in Mr. Dant's testimony, Tr. p. 133, prior to objection, Mr. Dant testified with regard to the contract in issue and a practically identical contract of the Douglas Fir Company, that there was a general custom and usage in the trade concerning the performance or obligation to perform contracts containing the "General Conditions" clauses. This testimony was subsequently admitted, Tr. p. 135 and 136.

Tr. p. 140, Mr. Dant, re-direct examination, the question was broadened to include an inquiry as to whether there is a custom generally in the export trade that clauses such as the clauses disclosed in plaintiff's exhibits Nos. 1 and 12, and providing that the deliveries are subject to, and conditioned upon, no liability against the seller by reason of the acts enumerated in those and similar clauses where strict performance, at the time specified in the contract, is prevented or rendered impossible by reason of strike or other enumerated causes, whether there is, in such contracts, a general trade custom and practice well known and understood throughout the trade generally, not only in the Northwest, but on the Pacific Coast and throughout the world, that such clauses, whatever may be their particular wording, are generally under the custom, construed to mean that the seller is obliged to deliver within a reasonable time after the removal of the impedi-

ment, or the cessation of the strike, if that be the cause. The court sustained an objection to this question. This is again an instance of an unjustified limitation upon the inquiry.

Notwithstanding the repeated refusal of the court to permit the inquiries as they related to custom and usage, with regard to general clauses of like import, there is present substantial and convincing testimony from witnesses entitled to full credit in this case, limited to the identical contract in issue, and the Douglas Fir contract which is practically identical, that such a custom and usage as is contended for by the appellant exists with regard to the identical contract, and that testimony is undisputed and not met by the testimony of any witness. The best defense made to this contention by the appellee was in the testimony of its general manager, Mr. Herber, who stated, Tr. p. 150, he knew of no such custom "as that which has been suggested here in this court today." Under the rule Mr. Herber is charged with knowledge even though he disclaim it. It is not the privilege of the court to disregard the material, undisputed testimony of reputable business men who submit themselves as sworn witnesses.

CONCLUSION

It is submitted, the appellant has fairly demonstrated, by logic and authority:

First: That the proper interpretation of the contracts in issue required performance by

the seller after the termination, on February 5, 1937, of the longshoremen's strike;

Second: That the proper presentation of its case has been prevented by the rulings of the court limiting it in its presentation of the testimony regarding a controlling usage and custom.

Respectfully submitted,

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No. 9196

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY,
a Corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

The appellee has no fundamental difference with the facts of this case as set out in the statement in appellant's brief. However, for the convenience of the court, and to point the way toward the argument on behalf of the appellee, a short resume of the facts is here given.

In large measure the facts are entirely undisputed. During the months of September and October, 1936, the appellee, as seller, and the appellant, as buyer, entered into a number of contracts for the sale of

Hemlock logs for shipment to the Orient. These contracts, which are more fully described in the pleadings (Tr. 1 to 8) and in the District Court's findings of fact (Tr. 203 to 208), called for delivery and shipment in different specified months during the latter part of the year 1936 and the first of the year 1937. All deliveries and shipments were to be made at either Grays Harbor or Willapa Harbor in the State of Washington.

After the making of the contracts a strike of longshoremen occurred in all seaports of the Pacific Coast of the United States of America, including Grays Harbor and Willapa Harbor. This strike commenced on October 28, 1936, and continued without interruption until February 5, 1937. All shipments which under the terms of the contracts were to be made prior to October 28, 1936, were made before the strike commenced, and all shipments which under the express terms of the contracts were to be made in the months following the cessation of the strike were likewise made. No delivery or shipment of logs was made by the appellee, seller, as to any logs which under the terms of the contract were to be made during the time the strike was in progress; thus, if a contract provided for shipment in the month of November or December of 1936, or January of 1937, the amount of logs which the contract called for in those months was never delivered to the appellant, purchaser. The appellant at the trial conceded that the strike rendered delivery and shipment impossible during these months (Tr. 33).

All of the contracts (Tr. 44 to 46) contained the

following language affecting non-performance by reason of causes beyond the control of the parties:

"General Conditions:

"Delivery and/or shipment of materials under this contract is subject to acts, requests, or commands of the Government of the United States of America and all rules and regulations pursuant thereto adopted or approved by the said Government, *and the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned* by acts of God, war, civil commotions, destruction of mill if named, fire, earthquakes, epidemics, diseases, restraint of princes, floods, snow, storms, fog, drought, *strikes*, *lockouts*, *or labor disturbances*, quarantine, or nonarrival at its due date at loading port of any ship named by the seller, or from any other cause whatsoever, whether or not before enumerated, beyond the seller's control, or for any loss or damage caused by perils usually covered by insurance or excepted in bills of lading, or for outturn. *Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days.* The conditions of usual charter party and/or bills of lading are hereby accepted by the buyers and the same are hereby made a part of this contract, save that said conditions shall not limit the exceptions above enumerated.

"Upon delivery of the goods to vessel all obligations of the seller hereunder shall cease and terminate, it being understood that thereafter the goods are for the account and risk of the buyers.

"In the event of war affecting this contract,

> the seller has the right of cancellation or charging to the buyers the extra premium for insurance against war risk. Buyers may at any time instruct that seller place war risk insurance, the cost of which is to be for buyers' account, if it can be obtained.
>
> *"The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it.*
>
> *"This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America."*

We have employed italics in the above quotation to specify the particular clauses which are deemed pertinent to the issues involved in this case.

Following the cessation of the strike, as is manifest from the appellant's claim for damages (Tr. 79 to 82), freight rates on log shipments had increased very substantially. The appellant insisted that appellee was obligated to proceed to deliver the logs which normally according to the express terms of the contract should have been delivered during the strike period. The appellee maintained that time was of the essence of the contracts, and that the obligation to perform was permanently excused as to all shipments which were prevented by the strike from being made in the express months specified in the contracts themselves as the time of shipment and delivery.

These adverse contentions squarely raise the question as to what rules of law are applicable to the contract provisions above quoted. The appellant, how-

ever, further maintained that regardless of the legal interpretation or effect of the contract it was entitled to show a trade custom or usage requiring the appellee, as seller, under such circumstances to perform the contracts within a reasonable period of time after the termination of the strike. The existence or lack of existence of such a custom is the only controverted fact on this appeal.

At the trial the parties agreed that if the appellant was entitled to recover, the measure of its damage was the sum of $17,272.17.

The trial court, at the termination of the trial, and after exhaustive argument upon the part of counsel, took the case under advisement and later rendered a written decision in favor of the appellee (Tr. 193 to 203) upon all of the issues. In conformity with this decision the trial court entered findings of fact (Tr. 203 to 212) in which were included all of the material undisputed facts which we have already mentioned. In addition the trial court found that no such trade custom or usage as that asserted by the appellant existed with respect to the contracts before the court.

The trial court also made conclusions of law (Tr. 212-213) including therein the conclusion that under the terms of the contracts the appellee, upon the cessation of the longshore strike, was under no obligation to sell, ship or deliver to the appellant any logs which under the terms of the contracts were to be shipped or delivered during the months of October, November and December, 1936, and January, 1937. In accordance with these findings and conclusions

judgment was rendered in favor of the appellee, seller, and from that judgment the appellant has appealed.

QUESTIONS INVOLVED

Although the appellant in its brief has made thirteen specifications of error, there are only three questions raised upon this appeal.

First, was the trial court correct in its conclusion that under the terms of the contracts the appellee, as seller, was permanently excused from the obligation of performing the contracts as to the amounts of lumber which according to the contracts were to be shipped during the period while the strike was in effect?

Second, was the trial court correct in sustaining the objections of the appellee to certain questions as to the existence of custom and usage with respect to contractual provisions similar to those involved in this case?

Third, was the trial court correct in finding from the evidence that, as a matter of fact, no such custom or usage of the character asserted by the appellant existed?

ARGUMENT

Upon the termination of the strike, appellee was under no duty to deliver any of the logs, which it had theretofore been impossible to deliver by reason of the strike.

The foregoing provision involves no question of fact whatsoever. As we have already pointed out, it was conceded that the strike of longshoremen which extended from October 28, 1936, to February 5, 1939, made it impossible for the defendant to perform its contracts during that period. There is likewise no controversy that each of the contracts contained the following provision:

> "* * * the seller is not liable for delay or non-shipment or for delay or nondelivery if occasioned by * * * strikes, lockouts, or labor disturbances * * *. Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

Each of the contracts also contained the following language:

> "The terms of this contract are herein stated in their entirety, and it is understood that there is no verbal contract or understanding governing it."
>
> "This contract is to be governed by the laws of the State of Washington, U.S.A., so far as applicable, and otherwise by the laws of the United States of America."

The immediate question presented is—Does the *force majeure* clause above set forth create merely a temporary excuse for performance and require the

seller to go forward with performance after the impediment thereto has ceased, or does it permanently excuse performance when such performance was effectively prevented by the strike during the period specified by the contract?

Under the authorities there can be no doubt that the majority rule is that the excuse is permanent; in other words, if performance is prevented during the period specified by the contract, the seller is absolutely relieved from his obligation to make delivery.

In Williston on Contracts, §1968, in speaking upon this point the author says:

> "If such a clause becomes operative and excuses the promisor from performance, the excuse has been held not merely temporary, operative only while the casualty continues, but a permanent excuse for nonperformance, unless the contract provides that delay only shall be excused."

In connection with the last clause of this quotation, it should be observed that the contracts here involved not only excuse performance in the event of delay, but also in the event of nonshipment or nondelivery.

The foregoing text statement is amply sustained by the authorities, of which we submit the following as the best expressions upon the subject.

Kunglig Jarnvagsstyrelsen v. National City Bank (C.C.A. 2) 20 F. (2d) 307;

Hull Coal & Coke Co. v. Empire Coal & Coke Co. (C.C.A. 4) 113 Fed. 256;

Atlantic Steel Co. v. R. C. Campbell Coal Co. (U.S.D.C. Ga.) 262 Fed. 555;

Edward Maurer Co. v. Tubeless Tire Co. (C.C.A. 6) 285 Fed. 713;

Indiana Flooring Co. v. Grand Rapids Trust Co. (C.C.A. 6) 20 F. (2d) 63;

Normandie Shirt Co. v. J. H. & C. K. Eagle, 238 N. Y. 218, 144 N. E. 507;

Black & Yates, Inc. v. Negros-Philippine Lumber Co., 32 Wyo. 248, 231 Pac. 398;

Ladd Lime & Stone Co. v. MacDougald Construction Co., 29 Ga. App. 116, 114 S. E. 75;

General Commercial Co. v. Butterworth-Judson Corp., 191 N. Y. S. 64;

Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115;

New England Concrete Const. Co. v. Shepard & Morse Lbr. Co., 220 Mass. 207, 107 N. E. 917;

Obear-Nester Glass Co. v. Mobile Drug Co., 205 Ala. 214, 87 So. 159;

Haskins Trading Co. v. S. Pfeiffer Co., 14 La. App. 568, 130 So. 469.

We shall review the facts in several of these cases in some detail.

In *Kunglig Jarnvagsstyrelsen v. National City Bank*, 20 F. (2d) 307, the facts were that the parties made a contract for the sale of 150,000 tons of coal. This contract contained a provision that shipments would begin thirty days after the raising of government embargo on export coal and should be completed within six months thereafter. The contract further provided that shipments should be made at approximately 30,000 tons per month, and contained the following clause with reference to strikes and government restrictions:

"Deliveries on this contract are subject to

> strikes at the mines and on the railroads and to all government restrictions and regulations, and the c.i.f. price is to be increased or decreased as the railroad rates of freight from the mines to tidewater may be increased or decreased during the life of the contract, and is also subject to increase or decrease as the mining rate may be increased or decreased over that existing to-day."

An embargo was in fact placed upon shipments of coal and was not lifted until May 1st. Following this, certain shipments were made in June. However, in June a railroad strike occurred, and the Interstate Commerce Commission issued an order, effective June 24th, directing railroads to carry coal to tidewater only when a permit could be obtained from government officials. The effect of this order was to shut down all shipments of coal until such a permit could be obtained. This order effectively prevented shipments under the contract in question until September 17th, when the order was withdrawn. It will be seen from this statement that the six months period specified in the contract commenced May 1st and ended November 1st; that performance was had from May 1st to June 24th, when the railroad order was issued, and thereafter became impossible until after September 17th. One of the questions presented was whether the defendant was required to deliver coal at the rate of 30,000 tons a month for the period during which it was prevented from doing so. With respect thereto the court said (p. 310):

> "Under the terms of the contract, in the event of an embargo on export coal, shipments were to begin 30 days after the raising of the government

> embargo and were to be completed within 6 months. The defendant was excused from failure to deliver the 30,000 tons in each month during the embargo, and cannot be held liable for these monthly deliveries. *Delivery being ompossible during these months, it was not a matter of mere postponement or suspension of delivery during the period that performance was prevented by governmental interference.* The contract in its entirety was made subject to a *force majeure* clause, and this did not permit the defendant to deliver the balance due under the contract in the period of one or two months. They were restricted by the terms of the contract to deliver 30,000 tons per month. *Edw. Maurer Co. v. Tubeless Tire Co.* (D.C.), 272 F. 990, affirmed (C.C.A.) 285 F. 713." (Italics ours)

It should be observed in connection with this case that the clause of the contract excusing performance simply provided that "deliveries" should be subject to strikes and government restrictions, but the court nevertheless held that this permanently excused performance as to all deliveries provided by the contract to be made within the period during which the strike existed.

This conclusively demonstrates that the provision excusing "delivery" is the equivalent to a provision excusing "performance," and that such a provision does not simply defer the obligation to deliver, but completely terminates the obligation to deliver after the time expressly fixed in the contract.

In *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, a case arising in the Fourth Circuit, the defendant agreed to sell to the plaintiff all the

coke it could make in its ovens from January 21, 1899, to December 31st of the same year. This undertaking was subject to a strike clause providing that "deliveries herein contracted for may be suspended or partially suspended" in the event of stoppage of the works of the defendant by any strike. A strike occurred, which prevented deliveries, and the plaintiff, not having received as much coke as it contemplated, contended that the word "suspended" in the strike clause should be construed "postponed," and shipments not made within the time fixed by the contract should be made after the month of December. In denying this contention, the court said (p. 260):

> "Time may be an essential element in a contract, as in the case at bar. It is well known that coke fluctuates in price. When the contract was made it was $1.16 at the ovens. At the end of the year it was worth $2.50 in the market, and the plaintiff on December 20th declined to accept a proposition to contract for the sale of its entire output at the ovens in 1900 at $2.24 f.o.b. cars at ovens, but offered to enter into such contract at $2.75 per ton, etc. *Time is therefore of material importance in this class of contracts, both as to sales, delivery, and payments.* Other business transactions of the parties for the year were dependent on the time element of the contract. *Knowing this, the parties fixed the time within which the contract was to be operative, and to put a different construction on it would be to ignore the language of the contract itself, and the evident intention of the parties when it was made.* That plaintiff subsequently made contracts with other parties in which losses were incurred cannot affect the construction of this contract. De-

> fendant possibly lost, too, by being compelled to deliver coke at $1.16, when the market price was much above that amount. There is nothing in the contract or strike clause which can reasonably be construed as extending the deliveries beyond December 31, 1899. *Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract. Carter v. Phillips* (Mass.) 10 N. E. 561; *Scarlett v. Stein,* 40 Md. 512." (Italics ours)

It is to be noted that the buyer in this case argued that the use of the word "suspended" in the strike clause indicated that only a postponement of the time of delivery was contemplated. This phraseology is certainly on its face not as favorable from the standpoint of the seller as the language involved in the contracts in the case at bar, but the court nevertheless held unqualifiedly that the obligation to perform was permanently excused rather than temporarily deferred.

The court also comments upon the importance of a fluctuating market in the industry which impels the parties, as a practical matter, to confine their commitments to reasonably short periods of time. The same practical circumstance, of course, exists in the lumber and shipping industries, particularly within recent years, during which, as every one knows, the costs and prices have been constantly rising.

In *Atlantic Steel Co. v. R. C. Campbell Coal Co.,* 262 Fed. 555, the precise question involved is excellently dealt with by the United States District Court for the Northern District of Georgia. Here the agreement of the seller was to sell 12,000 tons

of coal per year, shipment to be made at the rate of 1,000 tons per month or one car per day. The contract further provided that if the mines were unable to operate on account of strikes or other causes beyond the seller's control, the seller should not be liable "for failure to make shipments during such period." Shortly thereafter the United States entered war and the seller's mines were taken over by the Federal Fuel Administration, and performance of the contract by the seller was thereby prevented from August, 1917, to December, 1918. The contract was originally made in 1916 for a term of three years. The buyer contended that the prevention of performance by the Federal Fuel Administration for a part of the contract period did not operate to relieve the seller from any part of its obligation. The seller, on the other hand, contended, as the appellee in this case contends, that it was obligated to make only such deliveries as under the terms of the contract were to be made after the impediment to performance was removed, and that it was permanently excused from the obligation to make any of the deliveries called for by the contract during the period when the Federal Fuel Administration controlled the mines. In sustaining the defendant's position, the court said (pp. 560, 561):

> "That the defendant in this case, when called upon to surrender the use and control of its property to the public need, should thereby become liable to damages for failure to perform a civil obligation, is unthinkable. That its performance should be only temporarily excused would be less harsh, and, if time were not of the essence of the contract, it might be thought that no hardship

would result in a mere postponement. To apply the rule of postponement, however, to the many contracts that were indefinitely arrested by government action, both in coal mines and manufacturing establishments, during the war, would perhaps result in an accumulation of obligations to make deliveries or to receive and pay for goods that would be ruinous to the persons involved. It would seem to be a much more practical rule to establish that, when the performance became due, whether time was strictly of the essence or not, if performance could not be made because of government action then forbidding, and duration of which obstacle was indefinite and unascertainable, the obligation was thereby canceled and the contract discharged, and that the parties should each be at liberty and under the duty to save themselves as best they might by other contracts and arrangements. This, in principle, seems to be settled by the rulings as to embargoes on ships releasing their owners from their contracts to carry, in the cases of *Allanwilde Transport Corporation v. Vacuum Oil Co.*, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. ed. 312, and *Standard Varnish Works v. Steamship Bris*, 248 U. S. 392, 39 Sup. Ct. 150, 63 L. ed. 321. And see *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 66 L. ed. 297, 34 L. R. A. (N.S.) 671.

"The same conclusion may fairly be reached by a consideration of the contract that these parties actually made. While the occurrence of the exact conditions that did arise was, of course, not anticipated by them, still the contract provided:

" 'If the mines from which this coal is to be shipped are unable to operate by reason of min-

ing troubles, or on account of other causes beyond their immediate control, the first party is not to be liable for failure to make shipments during said period.'

"While in a certain sense the mines did operate they did not operate under the control of the defendant, nor was it able to avail itself of their operation in the discharge of its contracts. It may fairly be said that within the meaning of these parties, on account of causes beyond defendant's control, it could not operate its mine for the purpose of meeting the shipments due during the period of federal control, and that the stipulation that it should not be liable for the failure to make shipments is to be applied. In either view the defendant ought not to be liable for defaults during such period."

And later, to the same effect (pp. 561, 562):

"The simplest and best rule, and the one most consonant with good policy, is that suggested first above, that the action of the government, in so far as it directly interfered with and prevented the fulfillment of contracts, should be considered as a final discharge from their obligation."

In *Edward Maurer Co. v. Tubeless Tire Co.*, 285 Fed. 713, (a decision of the Circuit Court of Appeals for the Sixth Circuit), contracts for the sale of rubber were made subject to all rules and regulations imposed by the United States government. Certain restrictions were imposed by the government during war time. The seller sought to hold the buyer liable for refusal to take goods contracted for after the government restrictions were removed. The court held that the effect of the clause was not merely to

postpone performance, but to excuse the obligation of both parties permanently. In its opinion the court especially emphasizes the point that no sane business man would unqualifiedly commit himself to the performance of a contract for the sale of a commodity at some wholly uncertain time in the future contingent upon such an extrinsic circumstance as the conclusion of a war.

The decision in *Edward Maurer Co. v. Tubeless Tire Co., supra,* was specifically followed by the same court (that is, the Circuit Court of Appeals for the Sixth Circuit) more recently in *Indiana Flooring Co. v. Grand Rapids Trust Co.,* 20 F. (2d) 63.

We have grouped the foregoing cases for the reason that they are all decisions of Federal courts.

Turning to the decisions of the state courts, we first consider the case of *Normandie Shirt Co. v. J. H. & C. K. Eagle,* 238 N. Y. 218, 144 N. E. 507. In that case a very short contract was made for the sale of shirting. Among other things, it provided: "Delivery June-July-Aug.-Sept." This contract was on an order form, and on the reverse side appeared the following clause:

> "2—Fire, war, strikes, legislative, judicial or public administrative acts, errors, or defaults of the seller's mill, manufacturer, dyer, finisher, carrier, or vendor, or any cause not within the seller's control, preventing the delivery of merchandise in accordance with the terms of this contract, shall absolve the seller from any liability hereunder."

In order to demonstrate how identical the provisions of this clause are with those in the contracts

now before this court, let us set the two provisions side by side. Stripping both of their surplus language, the *force majeure* clause in the *Normandie Shirt Co.* case reads as follows:

> "* * * strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract shall absolve the seller from any liability hereunder."

While in the case now before this court the clause is:

> "* * * the seller is not liable for delay or nonshipment or for delay or nondelivery if occasioned by * * * strikes, lockouts or labor disturbances * * *."

This comparison reveals that both clauses simply provide that the seller shall not be liable for failure to make deliveries according to the contract.

The following excellent discussion by the New York Court of Appeals covers the question more adequately than could a paraphrase thereof by the author of this brief.

> "Deliveries were prevented by a strike, as has been conceded. Did this justify the defendant in terminating the contract, or were deliveries postponed to a reasonable time after September 30th? It must be noted that in this clause we find no statement that deliveries may be made later. It is confined to liability. It is assumed that the deliveries are to be made during June, July, August, and September. If the defendant failed to make these deliveries, it would be liable, but for this clause of its contract. For a failure to make deliveries, due to strike it is not to be liable at all. It shall be absolved from 'any liability hereunder'—not merely liability for delay, but from

any liability which would include failure to deliver at all. These strike clauses appear in mercantile contracts in various language, and have been the subject of litigation in numerous cases. Out of them has developed a general rule or principle of law. It is this:

"When deliveries according to contract have been prevented, by strikes of a substantial nature, or other like excepted causes, the party is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter. As to the installments not delivered according to contract, the contract is terminated. Whether this termination would extend to separable installments falling due after the strike, which it would then be within the capacity of the seller to deliver within the contract term, we do not need to consider. At least as to the installments falling due within the period of disability, the obligation would be ended. As to such installments, if it be the intention of the parties that the strike clause is merely to delay delivery, so that goods which could not be made or delivered because of a strike must be subsequently made or delivered within a reasonable time thereafter, the contract must clearly so provide. *Delaware, Lackawanna & W. R. R. Co. v. Bowns*, 58 N. Y. 573; *General Commercial Co., Ltd., v. Butterworth-Judson*, 198 App. Div. 799, 191 N. Y. Supp. 64; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 265, 51 C.C.A. 213.

"The cases referred to by the respondent will be found to have clauses in the contracts involved clearly indicating that delivery was to be delayed, and made up subsequently to the termina-

> tion of the cause of delay. We conclude, therefore, that this clause entitled the defendant to terminate this contract on September 30th, and to refuse to deliver any goods thereunder of which delivery had been prevented by strikes. In other words, it could not deliver by September 30th the goods which the plaintiff had ordered, by reason of the strike. The contract as to these undeliverable goods was therefore at an end, and the defendant was not obliged to make them up and to deliver them later. This clause did not call for a later or postponed delivery." (pp. 510, 511)

In *Black & Yates v. Negros-Philippine Lumber Co.*, 32 Wyo. 248, 231 Pac. 398, the contract was one for the sale of a large amount of lumber which the seller agreed to deliver to New York "as soon thereafter as it should become possible to secure transportation therefor by vessel from the Philippine Islands to New York City." This contract was made in February, 1916, and the buyer some years later brought suit for approximately $200,000, alleging that it became possible to secure such transportation on or about January 1, 1919. The defendant contended that although no specific time for performance was fixed in the contract, a reasonable time was implied, and that performance having been impossible for more than a reasonable time, because of the impediment caused by lack of shipping facilities during war time, the defendant should no longer be obligated to deliver the lumber. The plaintiff's position, of course, was that the defendant was obligated to deliver within a reasonable time after the impediment was removed. In

sustaining the position of the defendant seller, the court held:

> "It is held that when deliveries according to contract have been prevented by the operation of a casualty clause contained therein, such as that of fire, strike, or other unavoidable contingency, the promisor is relieved altogether, not only from liability for failure to make such deliveries, but also from the obligation to make them thereafter, unless, probably, only a delay of short duration is caused thereby, or unless the contrary appears from the contract. *Normandie Shirt Co. v. J. H. & C. K. Eagle, Inc.*, 238 N. Y. 218, 144 N. E. 507, and cases cited; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, 51 C.C.A. 213; *Edward Maurer Co. v. Tubeless Tire Co.* (D.C.) 272 Fed. 990, affirmed in (C.C.A.) 285 Fed. 713, and cases there cited. Williston on Contracts, §1968, and cases cited; *Jackson v. Marine Ins. Co.*, 10 L. R. 125 (1874). And it is further held that if it be the intention of the parties that the operation of the casualty clause is merely to delay delivery, requiring such delivery to be made subsequent to the unavoidable casualty, or within a reasonable time thereafter, the contract must clearly so provide. *Edward Maurer Co. v. Tubeless Tire Co., supra; Normandie Shirt Co. v. J. H. & C. K. Eagle, Inc., supra.*"

And further:

> "The question of course still remains whether that excuse was intended to be permanent or temporary. But the same question arises in interpreting any casualty clause whatever, and in any event—and that is as far as we need to decide—the rule that courts are not inclined to con-

> strue such clause as intended to give a temporary excuse only, unless that clearly appears, would seem to be applicable here, for the reasons upon which that rule is founded operate as strongly in the case at bar as in the cases cited."

It will thus be seen that this court, like the New York court, takes the unqualified position that an excuse extending over the contract period is a permanent one, and that if it be the intention of the parties that such excuse is not to be permanent, they must clearly provide to the contrary in their contract.

In *Ladd Lime & Stone Co. v. MacDougald Const. Co.*, 29 Ga. App. 116, 114 S. E. 75, the contract for the sale of crushed stone provided that shipments should begin with the month of July and continue at a daily rate not to exceed eight cars a day, and that the contract should expire by its own limitations on January 31, 1920. This contract was made on June 30, 1919. The contract further provided that "sellers shall not be held responsible for delays caused by strikes, accidents, or causes beyond their control." It will be noted that the strike clause purported to excuse delay only, but that the contract by its terms expired "by its own limitations on January 31, 1920." The seller did not deliver all the stone called for by the contract because prevented during the contract period from so doing by strikes. In holding that the seller was not obligated to make this delivery subsequently, the court said:

> "It is not unthinkable to contemplate the possibility of a contract providing for contingencies which would not only operate to delay the purchaser's right to call for delivery, but would op-

erate to destroy his right to demand delivery at any time and rescind the actual purchase of any undelivered stone. It is conceivable that the seller, on account of the advance in market prices, would be unwilling to bind himself to deliver after a fixed date, although he might be willing to bind himself to deliver before such date. It is conceivable that the purchaser was satisfied with the price and other provisions in his favor, and that he was willing to contract to relinquish his rights under the contract upon certain contingencies (as an expiration of the contract on a certain date) favorable to the defendant. The defendant's construction of the contract was reasonable and plausible. We therefore conclude that the seller could successfully defend upon the ground that he had not violated the contract during its life, provided the delay in delivery was caused by such circumstances as were beyond the seller's control and as would, under the terms of the contract, excuse delay while such circumstances existed."

In *General Commercial Co. v. Butterworth-Judson Corp.*, 191 N.Y.S. 64, the contract was made for shipment of goods in July or August at seller's option, provided that the contract was contingent upon strikes or other causes beyond seller's control. The seller did not ship during July or August, because of a strike, and later sought to hold the buyer to the obligation of accepting the goods. The court, after a complete discussion, held that the buyer was permanently excused.

We believe it unnecessary to further extend the analysis of the authorities cited. The other cases are all based upon the same principles, and some of them,

especially *Metropolitan Coal Co. v. Billings, supra,* 202 Mass. 457, 89 N. E. 115, contain very good discussions of the point under consideration. In the last analysis all of these authorities sustain the following propositions determinative of the question here involved. These propositions are:

1. Time is of the essence of a mercantile sales contract, even though the contract does not specifically so state.

2. If in such contracts there is a *force majeure* clause which comes into operation and excuses performance during the specific period fixed therefor by the contract, such excuse is permanent and not temporary.

Furthermore, several of the cases, as will be noted from an examination of the quoted portions thereof, point out with great emphasis that if the parties contemplate that the excuse shall be temporary in character only, then their contract must clearly so provide. In other words, in the absence of any provision clearly establishing excuse as a temporary rather than a permanent one, it must be held that the parties intended the excuse to be of a permanent character.

The obvious reason behind these rules lies in the fact that parties to mercantile sales contracts necessarily anticipate at the time they enter into the agreement that it is of the utmost importance that the commitment be performed only during the time specified, since otherwise the fluctuations which are repeatedly in process in commodity prices and shipping rates would necessarily render the transaction hazardous or injurious to one party or the other. By limit-

ing the obligation performed to a specific period this practical uncertainty which is so undesirable in the commercial world is reduced to a minimum and held in line with the actual intention of the parties at the time the contract was made.

Throughout the entire course of this litigation we have conceded that there is a minority rule contrary to that announced by the foregoing authorities. The minority cases, of which the following are the best examples, are cited in the appellant's brief:

> *Fish v. Hamilton* (C.C.A. 2) 112 Fed. 742;
> *Jackson Phosphate Co. v. Carleigh Phosphate & Fertilizer Works* (C.C.A. 4) 213 Fed. 743;
> *Acme Mfg. Co. v. Arminus Chemical Co.* (C.C.A. 4) 264 Fed. 27.

Fish v. Hamilton, supra, in which the court rendered a very brief opinion, is a decision of the Circuit Court of Appeals for the Second Circuit antedating *Kunglig Jarnvagsstyrelsen v. National City Bank,* 20 F. (2d) 307, a recent decision of the same court. The two as applied to the present question are indistinguishable, and *Fish v. Hamilton, supra,* must of necessity be regarded as overruled by implication. The *Jackson Phosphate Company* case, *supra,* and the *Acme Mfg. Co.* case, *supra,* both from the Fourth Circuit, entirely ignore *Hull Coal & Coke Co. v. Empire Coal & Coke Co.,* 113 Fed. 256, an earlier decision of the same court, which is in irreconcilable conflict with the two later cases. Although these two decisions possibly announce the Fourth Circuit rule, we submit that an examination of all three opinions from that

circuit will disclose that a much more careful and thorough examination was made of the entire question in the *Hull Coal & Coke Co.* case, which announces the majority rule.

The appellant in its brief cites only those authorities announcing the minority rule and completely ignores the cases cited by the appellee and followed by the District Court in its written opinion.

But even if there were room for doubt under the authorities, such doubt would in the present case be completely eliminated by one highly important and significant provision in the contracts. Each of the contracts contain the following clause:

> "Buyers agree to accept delayed shipment and/or delivery when occasioned by any of the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days."

The "aforementioned causes" referred to are the various contingencies mentioned in the *force majeure* clause.

This clause in the contracts shows beyond all doubt that the parties clearly understood that without such a provision the seller would not be bound to deliver and the buyer would not be bound to accept delivery after the dates specified therefor in the contracts. In other words, the parties knew that time was of the essence, and agreed to qualify this situation only to the extent of according the seller an option to make delivery for a limited additional period. By making the matter optional with the seller, the parties emphasized the fact that no obligation to perform vested upon the

seller. Obviously, if the seller were bound to perform after the strike, as appellant asserts, the clause above quoted, making performance optional with the seller, would be wholly meaningless.

None of the arguments advanced by the appellant as to the legal effect of the *force majeure* clause of the contracts is apt.

Apparently recognizing that its authorities are in the minority, appellant has advanced certain wholly unrelated contentions to support its position. Among these contentions are the following:

1. Impossibility of performance of a contract does not excuse the promissor.

2. A provision in the contracts for cancellation in the event of war is said to have some bearing upon the strike clause.

3. The clause in the contract giving the seller the right to make delivery for a period of thirty days after the period specified in the contract is sought to be invoked as a provision for the benefit of the buyer.

Looking to the first of these contentions, we admit that is is a well recognized rule of the law of contracts that mere impossibility of performance does not excuse the promissor from the duty of performing; *but this rule is subject to the definite qualification, wholly ignored by the appellant, that the contract may provide against the contingency of impossibility, and where such provision has been made, performance will be excused if the condition specified as an excuse occurs and in fact prevents performance.* In the in-

stant case, the general rule is obviously rendered inapplicable by the presence of the *force majeure* clause.

Appellant's next contention arises from the clause in the contract, which states:

> "In the event of war affecting this contract, the seller has the right of cancellation * * *."

Appellant argues that this clause shows the appellee had no right to cancel the contracts for other causes. There are two final answers to this contention. First, this provision is an entirely separate one from the strike clause, and has no bearing whatsoever on the latter. Second, the appellee is not asserting any right to a technical cancellation of the contract, as it might in the case of war, but rather simply asserts that the law has permanently excused performance. The appellee concedes that it had no right at once to cancel the contract immediately upon the occurrence of the strike. The two provisions are different in nature, in no sense inconsistent, and have well recognized, definitely established meanings in the law, and neither has the slightest bearing upon the legal effect of the other.

Appellant's next contention runs to the clause which provides that "buyers agree to accept delayed shipment and/or delivery when occasioned by the aforementioned causes, if so required by the seller, provided the delay does not exceed thirty days." We have never been able to understand how the appellant, as buyer, could take the view that this clause could be invoked to aid the position of the appellant. The clause manifestly recognizes that at the termination of the time fixed for delivery, if delivery had been

prevented by any of the causes mentioned in the *force majeure* clause, the buyer would be under no responsibility to take delivery, and that the seller would be under no responsibility to make delivery. The sole and very apparent purpose of the clause was to give the *seller* greater rights than it would otherwise have, that is, the optional right to compel the buyer to take the goods for a period of thirty days after the removal of the impediment. This right, being optional with the seller, obviously imposed no obligation on it. Rather it definitely confirms the seller's primary contention, that is, the time was of the essence of the contracts, and that both parties would be relieved from all obligation to perform, if performance was rendered impossible by any of the specified causes during the time initially agreed upon.

In addition to these contentions, the appellant also raises one or two other points of even less consequence; but to complete the argument, we shall comment thereon.

On page 23 of its brief, appellant suggests that there was only a nominal increase after the strike, amounting to 87½ cents a thousand, board feet. This contention is manifestly incorrect. The figure quoted is taken from a letter introduced in evidence as a part of Plaintiff's Exhibit 11, this particular letter appearing in the transcript, on page 61. This letter related to a shipment which was made after the strike, and refers only to a price on this particular shipment, in accordance with an agreement between shippers and certain carriers on "certain pre-strike freight contracts."

As a matter of law, the extent of the increase of freight rates after the strike is of no consequence whatsoever, since the rights of the parties are fixed by the terms of the contracts and not by the extent of the damage which might occur to either party. For this reason, neither side went into the question of variation of freight rates at the trial. However, for what it may be worth and to clarify the picture somewhat, appellant's written statement of its damages (Tr. 79 to 81) shows a freight rate of $20 a thousand upon the various shipments which the appellant made after the strike and which it is agreed constituted the lowest freight obtainable at that time. This price for freight alone was many dollars in excess of the combined freight and purchase price of the logs under the terms of the contract antedating the strike. The statement in appellant's brief, that the rate increase was only 87½ cents a thousand was incorrect and misleading.

Finally, appellant seeks to invoke an estoppel upon the ground that the appellee failed to advise it in advance of the termination of the strike that it would not make the shipments after the strike ended. It is axiomatic that an estoppel must be pleaded before it can be asserted, and no such contention is suggested in the pleadings of the appellant in this case. Likewise, no facts were proved to establish an estoppel. One of the essential elements of an equitable estoppel which is that the party asserting the estoppel relied upon the conduct of the other party, to its damage. In the instant case there is not the slightest showing or suggestion that the position of the appellant was

prejudiced in the slightest particular by reason of the failure of the appellee to inform appellant during the strike that the appellee would not be legally liable to perform after the strike ended.

We feel that we have given far more dignity to these arguments of appellant than they warrant. Independent of the question of custom or usage which we shall presently discuss, this case turns simply upon the determination of the legal effect of the *force majeure* clauses in the contract, and that question has been so often passed upon by the courts upon states of fact virtually identical with those in the case at bar as to render any indirect approach to the subject both unnecessary and improper.

The legal position of the parties is not affected by any trade custom.

The appellant asserts that despite the language of the contracts and the definite interpretation given thereto by the courts, its construction of the contracts is nevertheless sustained by a trade custom. The appellee contends, first, that as a matter of law no such custom can be proved to alter the clearly established meaning of the contracts, and, second, that as a matter of fact the appellant's evidence upon this point was insufficient to establish the existence of any such custom.

Evidence of trade custom cannot properly be introduced to vary the terms of the contracts.

The general rule as to proof of trade custom is stated in 17 Corpus Juris, page 508, as follows:

"Where the terms of an express contract are

clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is written or verbal."

And in *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534, the court in quoting from the case of *Simmons v. Law*, 3 Keyes (42 N.Y.) 217, says:

" 'A clear, certain and distinctive contract is not subject to modification by proof of custom. Such a contract disposes of all customs and practices by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined.' *Barnard v. Kellogg*, 10 Wall. 383; *Boon v. Steamboat Belfast*, 40 Ala. 184."

And the Washington Supreme Court continues by saying:

"It is only where a contract is silent in some particular or is ambiguous that proof of custom is admissible, and such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it."

In this connection, it should be remembered that the contracts expressly provide that they shall be governed by the law of the State of Washington.

The same rule has been consistently followed by the Supreme Court of Washington in line with the uniform law on the subject as recently as the case of *North Pacific Finance Corporation v. Howell-Thompson Motor Company*, 162 Wash. 387, 2 P. (2d) 684.

Also the rule has been followed by the Circuit Court of Appeals for the 9th Circuit in *Hecht v. Alfaro*, 10 F. (2d) 464.

The appellant, without questioning these principles,

apparently contends either that the contract is ambiguous or that the custom offered is not in conflict with the terms of the contract. We submit that the contracts are not ambiguous. To begin with, they call for shipment in certain months designated therein. They are mercantile contracts and consequently the time specified for performance is, as a matter of law, essential. They contain *force majeure* clauses excusing the seller from performance if prevented by any of the specified uncontrollable causes. Under these circumstances the overwhelming majority of judicial decisions establish the proposition that the excuse is not temporary but is permanent. In other words, that neither party is obligated to perform if the contingencies mentioned in the *force majeure* clause extend over the period fixed by the contract for performance.

If it might be assumed for the sake of argument only that the contracts might be uncertain or incomplete as an original proposition, the fact remains that the judicial interpretation of such contracts as established by the authorities cited by the appellee has established absolute certainty as to a meaning and effect to be given to the contracts here involved. In addition, the contracts in this case go further by the inclusion of the provision making it optional with the seller to hold the buyer for a period of 30 days after the impediment is removed. The contracts clearly show that it was the understanding of the parties that except for the rights conferred upon the seller by that provision, the contract was at an end on both sides. Taking all these factors together, absolute cer-

tainty and completeness exists both as a matter of fact and of law as to the meaning and effect of the contracts.

Both parties were, of course, bound to know the law which gave the contracts a clear and definite meaning. In this respect the case is precisely analogous to the endorsement upon a negotiable instrument such as a note or bank check. Looking at such an instrument standing by itself and without any knowledge whatsoever as to the law respecting the instrument, anyone would say that the relation of the endorser to the instrument was ambiguous. By simply appending an endorsement to such an instrument the endorser has not used any words in which it may be said that he has subjected himself to an obligation. The law, however, in such a case has long since established the meaning and consequences to be attached to the bare signature of the endorser. As a matter of law, by simply signing the instrument, the endorser guarantees that it will be paid by the party primarily liable. He also makes a number of other specific warranties such as those relating to his title and right to endorse and as to the genuineness of the instrument. No one would for a moment contend that it would be possible to introduce evidence that it was the custom and usage in a particular locality or in a particular trade that such an endorsement would subject the endorser to no obligation whatsoever, and yet that is precisely the nature of the contention advanced by the plaintiff in this case. We repeat that the contracts here involved are in all respects certain and there is no room for interpretation by parol evidence

when the law has already supplied the proper interpretation to be given to the contracts.

As a matter of fact, when accurately considered, the effort of the plaintiff here is not an effort to interpret any ambiguity in the contract; it is rather an effort to show that the contract has legal consequences which are precisely the opposite to those which the courts have said that contracts have. The law says that if performance of such contracts is prevented during the time specified by performance by the existence of one of the contingencies mentioned, then both parties are released. The contracts here involved qualify that rule specifically, providing that the seller for a limited period of thirty days shall have the option of holding the buyer. The custom here asserted is that the buyer is under such circumstances the only party released and it is said the custom gives to the buyer the option of holding the seller not for any specifically limited period, but for a reasonable time after the removal of the impediment to performance. This is not only contrary to every canon of construction which can be applied to this contract, but in fact goes far beyond the rule announced in the minority group of cases relied upon by the plaintiff to support its original proposition in this case. The most those cases assert is that both parties to the contract will be obligated to proceed with performance for a reasonable period after the strike has ceased. It is nowhere suggested that in the absence of a contractual provision to that effect the law places the buyer in the favored position of having the option to proceed with the transaction or not. Practically stated, this rule means that the

buyer would proceed if it were profitable to him to do so and would decline to proceed if it were unprofitable to do so, while the seller would have no corresponding option. It seems to us manifest that even though it be conceded for the sake of argument that custom might be proved for the purpose of effecting an interpretation of language, nevertheless it is impossible to admit evidence of custom which would result in holding that the contract had a legal effect diametrically opposite to that which the law gives to it.

Assuming for the sake of argument that the custom asserted by the appellant is properly provable, the evidence introduced at the trial is insufficient both in fact and in law to establish the existence of the custom.

The District Court found as a fact that no trade custom of the character asserted by appellant existed. This finding based upon conflicting evidence, should not be disturbed on appeal. *Woey Ho v. United States* (C.C.A. 9) 109 Fed. 888; *Pabst Brewing Company v. E. Clemens Horst Co.* (C.C.A. 9) 264 Fed. 909.

In *Washington Brick, Lime & Sewer Pipe Company v. Anderson*, 176 Wash. 416, 29 P. (2d) 690, the Supreme Court of the State of Washington, speaking through Judge Steinert, had the following to say about the nature and quantity of proof required to establish custom or usage:

> "To establish a custom tacitly attending the obligations of a contract, it must be shown to be uniformly prevalent and universally observed,

so that it may be said that the contracting parties either had such custom in mind or else must be presumed to have had it in mind, and consequently to have contracted with reference to it. Furthermore, the evidence to establish custom must be clear and convincing, free from ambiguity, uncertainty or variability. It must be positively established as a fact, and not left to be drawn as an inference from isolated transactions. *Jarecki Mfg. Co. v. Merriam*, 104 Kan. 646, 180 Pac. 224; *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. 771; *Scudder v. Bradbury*, 106 Mass. 422; *Continental Coal Co. v. Birdsall*, 108 Fed. 882; 4 Wigmore on Evidence, §1954; 27 R. C. L. 197.

"Our decisions, in so far as they touch upon the subject, are in line with these rules. *Johns v. Jaycox*, 67 Wash. 403, 121 Pac. 854, Ann. Cas. 1913D, 471, 39 L. R. A. (N.S.) 1151; *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389."

Briefly digested, this quotation establishes that a custom must be uniformly prevalent and universally observed and must be proved by clear and convincing evidence free from ambiguity, uncertainty or variability. We shall demonstrate the evidence in this case does not meet these requirements.

The appellant sought to prove the existence of the custom by five witnesses. Of these, Mr. Dant and Mr. Darling are the President and Vice President, respectively, of the appellant corporation. The other three witnesses may be said to be disinterested. On behalf of the appellee, the testimony of Mr. Herber, its manager, and Mr. Young, its auditor, was offered, and these witnesses categorically denied the existence

of any custom. We shall examine the testimony of the appellant's witnesses separately.

The first witness was Mr. Penketh, presently export manager for the Fairhurst Lumber Company of Tacoma. On direct examination, speaking of the custom in connection with the clause appearing in the defendant's contract, he said:

> "The general custom in my experience has been and is that any delays caused by these various exceptions that are recognized as requiring protection is only a delay as long as that cause lasts; and that after that cause has been overcome, the contract has been usually considered as being—having to be completed, and has been completed as a general practice." (Tr. 88)

The statement of this witness is simply that the contract has been *usually* considered as having to be completed, and has been completed as a general practice. This testimony, given on direct examination, therefore falls far short of showing a uniformly prevalent and universally observed custom. It only shows a usual and not a wholly uniform practice. On cross examination Mr. Penketh testified that he did not know how long he had been familiar with the clause contained in the appellee's contracts, but did recall that he had seen the clause some time this year, but stated that he did not know any custom in the trade with reference to this particular clause since he had seen it this year.

The next witness, Mr. Darling, is, as already pointed out, Vice President of the appellant company, and consequently an interested witness. His statement as

to the nature of the custom in so far as given on direct examination was:

> "The custom is that as soon as the causes for this delay are removed, the shipment must be made." (Tr. 105)

And in answer to the question as to how long a time might be allowed under the contract for performance after the impediment to performance had ceased, he stated:

> "It would depend entirely upon the quantity involved and the conditions that prevailed after the strike or other impediment had been removed." (Tr. 106)

Testimony of this character falls far short of meeting the requirements of certainty and unvariability required under the principles announced in *Washington Brick, Lime & Sewer Pipe Co. v. Anderson*, 176 Wash. 416, 29 P. (2d) 690, *supra.*

On cross examination the same witness testified that with the exception of the two longshore strikes in 1934 and 1936-1937, he was not aware of any instance where delivery was ever made under the contract form involved in this case, and he further admitted that when he said that he believed there was a custom with reference to the particular clause in the appellee's contracts he was simply giving his opinion on the subject; that he had given the clause considerable study and based his statements upon that study. He further testified unqualifiedly that the custom did not subject the buyer to any obligation to take the goods after the specific period fixed in the contract had expired.

The next witness was Mr. Haig, General Manager

of Pacific Coast Spruce Corporation. He described the custom as follows:

> "Well, the custom has been to make delivery of the goods contracted for after the period that was named in the contract, if a strike or other unforseen circumstance occurred that prohibited the seller from making delivery in the time specified." (Tr. 111)

And in answer to the inquiry as to the length of time for performance under the custom he stated:

> "Well, there has been a custom of thirty days, but it has often been extended by mutual agreement between the buyer and the seller." (Tr. 112)

He further stated that the continuance of the impediment might possibly affect the custom. Not only is the nature of the custom made indefinite by the last statement, but it must also be observed that the custom described is simply one to make delivery of the goods and it is not stated that there is any custom requiring delivery to be made. We emphasize this point, because we do not question that it may have been the practice of various concerns in the past to make delivery after the strike for purposes of policy or because it still remained profitable to do so. Such a practice does not establish any custom of the kind here relied upon by the appellant. Rather, the appellant must show not simply that the thing is done but that by custom the party is regarded as being absolutely obligated to make delivery.

On cross examination Mr. Haig admitted that he had not seen the appellee's contracts before the day of the trial and that he knew of no instance in which

any custom had been followed under those contracts or any contract of the defendant having the same clause in it.

On redirect examination he simply reaffirmed his earlier testimony in the following language:

> "The contracts were filled after the strike, after strike was over, were filled in a reasonable time." (Tr. 121)

On recross examination, this witness became very evasive when interrogated as to whether the buyer was required after the cessation of the strike to accept the goods. He finally testified that the custom requires the buyer to accept the goods. He admitted, however, that the uniform practice was for the seller to call up the buyer after the contract period had expired and then make a new agreement for shipment after the contract period (Tr. 124 to 127).

The latter part of this witness's testimony on recross examination not only shows that he entertained a vague and different notion from that given by Mr. Dant and Mr. Darling, the officers of the appellant, in that both of those witnesses positively state that the custom imposes no obligation on the buyer, whereas Mr. Haig originally seemed to think that it did bind the buyer as well as the seller, but that in the last analysis Mr. Haig admitted that a new agreement was made in each instance where the contract period had expired. In view of the testimony appearing in this portion of the record, we submit that Mr. Haig's testimony cannot be accorded any weight or validity toward establishing a uniformly prevalent and universally observed custom, which the law re-

quires to be established by clear and convincing evidence which is free from ambiguity, uncertainty or variability, these being the requirements specified by the Washington Supreme Court in the case already cited.

The next witness offered by the appellant was Mr. Force, president and general manager of the Douglas Fir Export Company. Although produced as witness for the appellant, his testimony, instead of being favorable to the appellant, consisted of a refusal to state that there is any custom. He stated:

> "I would not want to say that there is a recognized custom. I know what we do." (Tr. 130)

And at the conclusion of cross examination, he testified that he was not aware of any custom with reference to the performance of the contract of the appellee (Tr. 132).

The final witness for the appellant was Mr. Dant, whom we have already mentioned as the President of the appellant corporation. His testimony as to custom is:

> "Well, there is a general custom on the Pacific Coast and all over the world that in the case of strikes or other impediments which delay a shipment, that that shipment will be made within a reasonable length of time after those difficulties are removed." (Tr. 134)

And, again, he testified to the same effect:

> "Well, that custom would be to ship within a reasonable length of time, as soon as possible within a reasonable length of time."
>
> "Q And is there any measure as to any rea-

sonableness of that time which is generally understood in the trade?

"A It depends on conditions. It might be that space would be available immediately, or it might be a month or two months or three months; and I would say that we have sometimes had much longer than that." (Tr. 136)

On cross examination he stated, page 82, that the buyer did not have to take the goods after the strike had ceased, but that he was accorded an option which did not exist in favor of the seller.

Taking the testimony of these witnesses as a whole, it appears that two of them, Mr. Dant and Mr. Darling, are interested as officers of the appellant; that they testified to a custom that the shipment will be made within a reasonable length of time after the impediment ceases, but that the buyer is not bound to this custom at all.

It should be remarked that the existence of such a custom is denied by two interested witnesses called by the appellee (Tr. 150, 185). Looking to the testimony of the three disinterested witnesses, it at once appears that no one of them agrees with any of the other witnesses for the appellant as to the nature and extent of the custom, and that one of them, Mr. Force, refuses to testify that there is any custom. Mr. Penketh says that it is usually considered as having to be completed, but does not say that there is any custom making it obligatory that the seller make delivery. Mr. Haig says that custom "has been to make delivery" after the strike and that it is a custom to do so for thirty days, which is often extended by mutual agreement between the buyer and the seller. This

is a thought which none of the other witnesses suggest in connection with the custom. As an original proposition he denied in cross examination that custom was not binding on a buyer, but finally admitted that in any case a new agreement was made between the parties after the expiration of the period fixed by the contract. Mr. Force, as we have already observed, declined to testify to the existence of any custom.

Taken together, the testimony of these witnesses shows that there is no custom imposing any legal obligation on the seller to deliver after expiration of the specific time fixed for delivery. Rather than proving the existence of any uniform and universally observed custom within the rule of the *Washington Brick & Lime Case, supra,* 176 Wash. 416 (page 23 of this brief), the testimony shows complete confusion upon that subject. The proof is replete with uncertainty and variability, which, as a matter of law will necessarily negative rather than establish the existence of the custom. The only possible conclusion is that several of the witnesses have in mind the fact that within their experience some contracts have been performed after the contingencies specified in the *force majeure* clause have ended. And it must not be overlooked that the custom attempted to be proved by the appellant was an amazing one—one not creating a mutual obligation—one whereby the seller was bound but not the buyer.

As Mr. Haig remarks, it is generally proved in those cases that the buyer wants to take the goods, and it is no doubt equally true that in many cases the

seller wants to sell the goods. Where neither the cost of the goods nor the other expenses of performance are different from what they were at the time fixed by the contracts for performance, then both of the parties would be quite willing to go through with the deal to their mutual profit. Likewise there may be many instances in which either or both of the parties go through with their commitments simply as a matter of business policy, even though it may be unprofitable to do so. However, performance for any such practical reason does not establish a custom, since it is attributable entirely to other causes.

In conclusion upon this point, may we call to the court's attention the fact that not one of the witnesses testifies to a specific instance in which in his experience the matter of custom has been squarely made the basis for requiring performance. Furthermore, the correspondence introduced in evidence, although very extensive, does not contain the slightest intimation that the appellant is asserting the existence of a custom or relying upon it. There is not a shred of testimony in the record indicating that the subject of custom affecting the contract was ever mentioned in any discussion between the parties anterior to the institution of this suit. As a matter of actual fact, the issue of custom was first called to the attention of the appellee by the reply made by the appellant to the affirmative defenses; This reply having been filed after this court sustained the demurrer requiring the validity of appellant's contentions based strictly upon the terms of the contract.

The trial court rightly refused to admit evidence of trade custom or usage under contracts other than those involved in the case at bar.

Appellant makes, but does not argue at any length, the point that the trial court erred in excluding certain testimony as to custom. The nature of the testimony excluded is clearly shown by appellant's offer of proof (Tr. 107), by which appellant proposed to show "what the general custom is as to * * * clauses of similar import and tenor generally used in contracts throughout the trade." The so-called "clauses of similar import and tenor" were not produced by appellant; consequently their similarity could could not be judged by the court or challenged by counsel for the appellee.

Of course, if appellee's contention that no evidence of custom or usage is admissible to vary the terms of the contracts is correct, that principle alone renders consideration of the present question unnecessary. But even if it be assumed, for the sake of argument only, that, as a broad general proposition, evidence of custom or usage could be introduced, nevertheless, the trial court was obviously right in refusing to admit testimony of the character above mentioned.

Appellant cites no authorities sustaining its position. Independent of any authority, however, the vice of appellant's contention is readily demonstrable.

The issue presented is: Does a trade custom exist which attaches consequences to a specific contractual provision diametrically opposite to the consequences attached thereto by the courts in the absence of any such custom?

In order to establish a trade custom or usage of this character, it must of necessity be shown that the custom or usage relied upon is one applicable to the specific language of the contract involved. Evidence showing a custom or usage with respect to a contract containing "similar" language certainly is not enough, especially where the witness is to be the conclusive judge as to the extent of the similarity.

If appellant's views are adopted, a witness can say: "True, I know of no custom and usage affecting a contract containing the language now before the court. However, I know of a custom and usage on similar contracts. I am unprepared to demonstrate the similarity, so that any one other than myself can judge whether or not distinguishing factors exist. Nevertheless, you must accept my judgment that the custom, concerning which I am about to testify, applies to the contract which we are considering in this proceeding."

This court is called upon to pass upon a specific group of contracts. It is thoroughly familiar with the fact that courts repeatedly must distinguish between different contracts of the same general type, because of detailed differences of language. There would be no point in aspiring to any mode of correct expression in drafting contracts, if the effect of the language employed could be glibly avoided by testimony that some other document, never even seen by the court, was subject to a different interpretation.

As a matter of fact, the appellant produced one other form of contract as a basis for its proof of custom (Plf's. Ex. 12). It submitted this form to

the witness Force (Tr. 129) and asked about the custom with respect to it, and this witness, called by appellant, stated that he would not want to say that there was any recognized custom of the nature asserted by appellant. It must be conceded that the same consequence, or others equally damaging to appellant, might have attended the production of any of the other "similar" contracts to which appellant's offer of proof refers.

Manifestly, where it is sought to show a custom or usage contrary to the meaning of language as announced by the courts, the testimony addressed to that subject cannot be of the doubtful and remote character which appellant suggests, but must be clear, pertinent and direct.

CONCLUSION

In conclusion, appellee submits that the decision should be affirmed because:

1. The overwhelming weight of authority gives to the *force majeure* clauses legal consequences exonerating appellee from liability.

2. The contracts as a matter of law are not subject to variation by proof of custom or usage.

3. In any event, the district court found as a fact that no custom or usage, of the nature asserted by appellant, existed and that finding based upon conflicting and variable evidence should not be disturbed on appeal.

Respectfully submitted,

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No. 9196

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANT & RUSSELL, INC., a Corporation,
Appellant,

vs.

GRAYS HARBOR EXPORTATION COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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ARGUMENT

Appellee in attempting to meet and refute the logic of appellant's brief, in connection with the construction to be accorded the contract itself, has made an analysis found beginning with the second paragraph on page 26, and ending at the middle of page 31 of appellee's brief. Before proceeding to a discussion of authorities quoted by

appellee, it is deemed advisable to comment upon this portion of appellee's brief. Appellee contends that the 30-day clause quoted on page 26 of its brief, clearly shows an understanding of the parties that without such a provision the seller would not be bound to deliver, and the buyer would not be bound to accept delivery after the date specified therefore in the contracts. We are at a loss to understand how this clause shows such an understanding, in view of the other provisions of the contract, and, particularly in view of the fact that the time element feature of the contract had been previously expressly waived by the excusing of delays caused by strikes. No clause was necessary to impose upon the buyer the duty to accept a delayed shipment. The contract itself without this 30-day clause, we believe to have been an undertaking made in contemplation, and expectation of delays, and one, which by their choice of language, the parties evidenced an intention to fulfill after delays, otherwise as previously argued in appellant's brief, why not simply say the contract ends upon the happening, or the continuance of such an impediment?

We believe it cannot be fairly said, in view of the fact the seller was not to be liable for delays, that time was, nevertheless, of the essence thereof. To say further, that by making the matter optional with the seller, the parties emphasized the fact that no "obligation to perform vested upon the seller" is to beg the question. Naturally, if performance

after the impediment was removed was optional with the seller, no obligation to perform vested upon the seller. The question, however, is, *was the matter optional with the seller,* and *was the seller obliged to perform within a reasonable period of time?* As contended in our first brief, a condition might have arisen whereby 10 days would have been an unreasonable delay, so that after 10 days, the buyer could not have demanded delivery but the seller, under the real meaning of the 30-day clause, could have forced the buyer to take for a period of 30 days. It does not, therefore, follow, as claimed by the appellee, that the clause is meaningless, if the seller be held bound to perform after the strike.

Counsel has next indicated that in stating the proposition, that impossibility of performance of the contract does not excuse the promissor, we have overlooked the qualifying rule, that the contract may provide against the contingency of impossibility, and if it does, performance will be excused, if the specified conditions occur, and in fact prevent performance. Perhaps we have failed to state specifically that the contract may provide an excuse to the promissor for impossibility of performance. It cannot, however, be contended that we have overlooked this qualifying rule, because we have devoted a good portion of our brief to an analysis of the express provisions of the contract, in an attempt to determine, whether or not, its wording expressly or by implication in the contract, accorded to the seller the claimed protection.

It would seem also, that appellee recognizes the logic of our reasoning to that end. In stating the qualifying rule, appellee has concluded the italicized portion of his statement with the phrase, "and in fact prevents performance." We believe it cannot be shown that the strike prevented performance, except at the stated time therefor. Appellee must argue that when a strike prevents timely performance, it does, in fact, prevent all performance. It is difficult to see the logic of this argument, where the parties have chosen language relieving the seller from liability for delay, *in preference to language clearly calling the contract at an end,* upon the happening of the strike, and continuance beyond the delivery date.

It is next contended by appellee, regarding the war cancellation privilege, that it has no bearing upon the interpretation of the contract regarding the present controversy, for the reason that the provision regarding the right of cancellation in event of war, is an entirely separate one from the strike clause, and for the additional reason "the appellee is not asserting any right to a technical cancellation of the contract, as it might in a case of war, but rather simply asserts that the law has permanently excused performance." As to the first of these propositions, we can not agree that the provisions regarding war and strike are separate provisions. It is first said, there will be no liability, for delay, or non-shipment caused by strikes, war, etc. It is next said, "we may cancel in the event of war." Let us take the example of

a boy with two fish. One of the fish was large, necessarily implying, we believe, that the other was not. One of the fish was a trout, necessarily implying, we believe, that the other was not. One of the fish was caught by him, necessarily implying that the other was not. One of the fish is dead, necessarily implying that the other still lives. And so, with the war clause. The stated privilege of cancellation in the event of war, necessarily negatives a corresponding privilege in connection with any of the other impediments. Why should there be a clause in the contract giving the seller the right of cancellation in the event of war, when, if the appellee's interpretation of the other previous provisions of the contract is correct, it already had that right upon the continuation of the war beyond the delivery date.

It is axiomatic that the contract is viewed from its four corners, and that every provision in it bears upon every other provision. It is particularly appropriate to mention that these so-called special provisions are all a part of the general conditions clause, and are all dealing with impediments to performance. These general conditions are simply one subject matter. As to the second of his so-called final answers, we believe that it states a distinction without a difference. We are unable to view the happy phrase "permanently excused" as having any different practical effect, than the right of cancellation, accorded the seller in event of war. It all adds up to the same answer, the buyer doesn't get his logs. In analyzing the

contract as to the claimed privileges in the event of war, or strike, we still have the condition contended for in our first brief. If the contract had intended that the buyer shouldn't get the logs in the event of strike, why didn't it say, "in the event of war * * * strikes, and 16 other clauses, the buyer doesn't get the logs"? Whether it be a permanent excuse, a default under the contract, a privileged cancellation, or whatever it may be, we are unable to see the distinction claimed by appellee.

We are at a loss to understand the contention of the appellee, that we are claiming a benefit from the so-called 30-day clause. We do not now, nor have we in our first brief, advanced the contention that the clause was inserted in the contract for the benefit of the buyer, or that it aided our position. We do not contend that this clause imposed an obligation upon the seller to perform. We have only sought to explain the real meaning of the clause in relation to the other portions of the contract.

We recognize, of course, as stated by appellee, page 30 of its brief, that the extent of the increase of freight rates after the strike, is of no consequence in the case. We believe, however, that the fact of a nominal increase in the freight rate shortly after the termination of the strike, coupled with the refusal of the seller to commit itself, or to definitely refuse shipment, has a considerable bearing upon the proposition of estoppel.

As had been anticipated, appellee claims we cannot invoke the doctrine of estoppel, for the reason it was not pleaded. A fair construction of appellee's answer, indicated its reliance upon those terms of the contract relating to non-shipment, and non-delivery, as being the privilege claimed by it. To this contention, estoppel is not a defense. At no place in the answer is there any contention made that the delay caused by the strike was unreasonable, and it is to bar such a claim at this time, that the doctrine of estoppel is discussed, and, as to which we have previously said, the opportunity to plead estoppel never arose. Counsel further says in this connection, that in any event we would not be entitled to the benefit of the doctrine, because of a failure to show a reliance upon conduct of the seller to our damage. It is believed that this proposition is answered by the appellee's own argument of a freight increase from 87½c to $20.00 a thousand, during the period when the buyer was attempting to get a commitment, either of liability or non-liability from the seller.

As to the authorities cited by both parties, regarding the interpretation of this contract, we find some difficulty in agreeing with appellee, that ours represent a minority view. On the other hand, with few exceptions, we will undertake to distinguish appellee's authorities for the most part by reference to the wording of the contracts to which they relate. It will be found, we believe, that appellees claim to have embraced the majority view is not well taken.

It is further interesting to note that counsel for the appellee has completely failed to distinguish appellant's authorities from the case at bar. It is likewise interesting to note, that the courts, in all cases cited by appellee, have failed to overrule the authority of appellant's citations, but in each of those cases, as will be hereinafter shown, have found a feature upon which to base their judgment that is not found either in the case at bar, or in appellant's authorities. We believe there may be found some apt sounding phrases and expressions, from which appellee may take comfort. We are not able to agree, however, that the apt sounding phrases determine the issues in these cases.

ANALYSES OF APPELLEE'S AUTHORITIES RE INTERPRETATION OF CONTRACT

We now proceed to a discussion of appellee's authorities.

Williston on Contracts, Section 1968.

Appellee's quotation of the authority is correct. It seems advisable, however, to add to the citation additional matters found therein:

> "It has become common for manufacturers and others to insert in their contracts clauses relieving them of liability, in case of strikes and other unforeseen casualties. The words of these clauses are not identical, and it can only be said that while such agreements are legal, it is essential to prove that a strike or

> casualty, within the terms of the clause in question, was the *actual cause* of non-performance."
>
> (Italics ours.)

We call attention in appellee's citation, to the words "and excuse the promisor from performance." This, of course, is the issue in this case. The citation, therefore, begs the issue. It will also be recalled, that the last words of the citation are "unless the contract provides that delay only shall be excused." Our contracts provide that delay shall be excused if caused by strikes, beyond the seller's control. Our contracts further provide that non-shipment and non-delivery shall be excused if caused by strikes or other conditions beyond the seller's control. There can be no delay in shipment until after the last day of the last month specified for delivery, so that it must be held that the delay anticipated is after the end of the delivery date in the contract. This delay then is expressly excused. We believe it cannot be said then, with the delay excused, and timely performance out of the way, that non-shipment and non-delivery were rendered impossible under the terms of the contract by the strike. Therefore, under the wording of the contract, we do not find a clause which has "become operative and excuses the promisor from performance," but rather a situation covered by the first part of the citation, wherein it is stated, "It is essential to prove that a strike or a casualty within the terms of the clause

in question, was the actual cause of non-performance."

We will next discuss the cases in the order in which appellee has treated them.

> *Kunglig Jarnvagsstyrelsen vs. National City Bank* (C. C. A. 2), 20 F (2d) 307.

The terms of the contract itself are determinative in this case. A distinguishing element of this contract, was that shipments under the contract were expressly to be completed within six months, and that shipments were to be made at approximately 30,000 tons per month. The court stated as cited by appellee, that the contract had an express limitation of six months, and likewise "they were restricted by the terms of the contract to deliver 30,000 tons per month." The court properly refused to so construe the contract, as to require against the express terminology of the contract, the entire tonnage to be delivered during the last two months, where the entire tonnage was in excess of 60,000 tons.

> *Hull Coal and Coke Co.* (C. C. A. 4), 113 Fed. 256.

In quoting from this case, counsel has said simply the undertaking was subject to a strike clause providing that "deliveries herein contracted for may be suspended or partially suspended in event

of stoppage of the works of the defendant by any strike." In point of fact, there was considerably more to the strike clause than quoted. As is stated at page 258 of the Federal Reporter, this additional matter was a part of the strike clause, "or at the option of the party not in default may be immediately cancelled during the continuance of such interruption, by immediate notice to that effect given to the other party." In this case, the buyer was in default, and the seller cancelled for that reason. There is an additional distinguishing feature. The contract provided for the sale of the entire output of ovens between January 21 and December 21, the purchaser, in fact, got the entire output, although not as much as the guarantee called for. The court further held that whatever the output of the ovens was during that period of time, belonged to the purchaser, whether it was big or small, that the period of time itself was expressing the limit of the contract, and that consequently the seller had no opportunity of making up any deficiency during the period when it had placed its ovens at the disposal of the buyer.

A distinguished rule is stated in appellee's own citation, which he has italicized:

> "Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract."

> *Atlantic Steel Co. vs. R. C. Campbell Coal Co.* (U. S. D. C. Ga.), 262 Fed. 555.

This contract covered a long period of time. The requirements of the Atlantic Steel Company, plaintiff, were 1000 tons of coal per month, and the contract called for 12,000 tons per year, for a three-year period to be delivered 1000 tons each month. It would seem fairly clear that where a buyer was buying for his own current requirements, coal to operate his plant for a definite period of time, there would be no reason for requiring seller to make up deliveries impeded by an excusable condition, after the impediment had ceased to exist. Obviously a buyer could not be required in September, to accept coal needed for the operation of its plant the preceeding June, and, under these circustances, the doctrine of mutuality would not permit a remedy in favor of the buyer against the seller, arising from the same state of facts. The case is further distinguishable, in that it concerns a severable contract, so interpreted by the plaintiff buyer, in a letter of January 31, 1917. The court finds the consideration to have been severable, payment being made each month for each month's delivery, and so holds the contract to be severable. There can be no severable element in the several contracts in the case at bar. There is only one delivery, or one period for delivery specified in each of the contracts.

Edward Maurer Co. vs. Tubeless Tire Co. (C. C. A. 6), 285 Fed. 713.

In this case, the court finds that there was a prospect of a two-year delay, and that it would be unreasonable to suppose the parties intended their contract to abide a delay so long and uncertain. It is stated by the court:

> "The contract is its entirety is made subject to force majeure. It is not deliveries only, but the contract obligation itself, which is thus made to depend upon these conditions."

In this contract it is provided:

> "This contract is subject to all the rules and regulations * * *."

and further:

> "This contract is subject to force majeure, strikes, etc."

This is a far cry from the terms of the contract in the case at bar, where only delay or non-shipment and non-delivery caused by strike are alone excused. In this case also, the court points out that it has clearly appeared:

> "That the defendant, with full knowledge and understanding on the part of the plaintiff, was intending and attempting to buy rubber for delivery ta specific times to meet its factory requirements in war times, and at war prices, and was not intending to contract for large amounts of rubber in gross. * * * At the time these contracts were written, no one could prophesy the end of the war. It was then generally believed that the war might last for several years."

In the case at bar, the anticipated duration of a strike would not have been bounded by years, but rather by weeks, which is a far different condition.

> *Indiana Flooring Co. v. Grand Rapids Trust Co.* (C. C. A. 6), 20 F. (2d) 63.

The contract contained the provision: "All agreements and contracts are contingent upon strikes, fires * * *." A fire occurred.

Here is another instance in which the contract itself, by its express terms was to be in its entirety contingent upon strikes, fires, etc.

> *Normandie Shirt Co. vs. J. H. and C. K. Eagle,* 238 N. Y. 218, 144 N. E. 507.

This case, for which appellee claims a similarity of strike clauses with the case at bar, is in no sense similar, in that by its express terms, the contract in the cited case states:

> "Strikes * * * preventing the delivery of merchandise in accordance with the terms of this contract, shall absolve the seller *from any liability hereunder.*"
>
> (Italics ours.)

Here again all liability is at an end, upon the happening of a strike preventing delivery in accordance with the terms of the contract. Whereas in

the case at bar *instead of all liability the seller is released only from liability for delay, or non-delivery, and non-shipment actually caused by strikes.*

There will be found, in the citation of the appellee herein, the distinction above indicated, wherein the court states:

> "It shall be absolved from 'any liability hereunder' * * * not merely liability from delay, but from any liability which would include failure to deliver at all."

> *Black and Yates, Inc., vs. Negros-Philippine Lumber Co.,* 32 Wyo. 248, 231 Pac. 398.

In the cited case, the contract was made in 1916, and performance was impeded for a period of three years. The court very properly held that a three-year delay was an unreasonable delay, a contention not advanced in connection with the case at bar. It will be recalled that we have never claimed that an unreasonable excused delay would leave the parties bound to performance. Appellee recognizes, in quoting from this case at the top of page 21 of its brief, that the case does not intend to hold the promiser could be relieved altogether, where only a delay of short duration is caused by the impediment to performance.

> *Ladd Lime and Stone Co. vs. MacDonald Construction Co.,* 29 Ga. App. 116, 114 S. E. 75.

In this case, the contract provided:

> "This contract shall expire by its own limitations on January 31, 1920, and the court held that the express expiration date of the contract controlled all other provisions therein."

There is no such expiration date in the contracts at bar.

> *General Commercial Co. vs. Butterworth-Judson Corp.,* 191 N. Y. S. 64.

The case clearly distinguishes between a contract being contingent upon a strike, and a case wherein delivery is contingent upon a strike. The contract provision itself provided:

> "This contract is contingent upon strikes * * *."

> *Metropolitan Coal Co. vs. Billings,* 202 Mass. 457, 89 N. E. 115.

The contract provided that the seller was "to furnish the defendant's house at number 409 Marlboro Street with *such quantity of coal as can be delivered prior to November 1st.*" The undertaking itself in this case was an expressly limited one.

Other cases have been cited by the appellee, but not discussed. We briefly call attention to the distinguishing characteristics of the cited cases.

New England Concrete Construction Company vs. Shepherd and Morse Lumber Company, a Mas-

sachusetts case, 107 Northwestern 917. Contract provided: "All contracts are contingent upon strikes * * *."

Hoskins Trading Company vs. Pfeifer and Company, a Louisiana case, 130 Southern, page 469. The contract provided: "All agreements are contingent upon strikes, delays of carriers, and other causes unavoidable, and beyond our control."

Obear-Nester Glass vs. Mobile Drug Company, an Alabama case, 87 Southern 159. The contract provided: "The seller agrees to take all reasonable care and diligence in filling this contract, but shall not be responsible for any delays or non-shipment, resulting from acts of providence, strikes, lockouts, fires, floods, or any accident or contingency beyond its control." The agreement further provided: "Shipments to be made as follows, in carload lots, *at specified dates, between the date of contract and July* 31, 1916." The court held that here was an express provision limiting the life of the contract.

(Italics ours.)

Summarizing briefly, it will be seen that in all cases cited by appellee, one or more of the following distinguishing characteristics were present:

1. The contract was *expressly* limited to a definite period of duration.

2. There was a purchase for current use and consumption by a manufacturer.

3. There was an *express* condition in the contract authorizing either cancellation or freedom from any liability.

4. There was an actual or prospective delay of unreasonable duration.

5. The contract itself, in its entirety, and not merely delivery, was *expressly* subject to, or contingent upon strikes, etc.

ANALYSES OF APPELLEE'S STATEMENT OF CUSTOM AND USAGE

Appellant has no quarrel with the general law cited by appellee, on the doctrine of custom and usage. We will reply chronologically to the arrangement adopted by appellee, beginning on page 31 of appellee's brief.

It is not the appellant's claim that custom and usage sustains our interpretation of the contract, despite its language, but only that on account of the failure to negative such known general custom and usage, it therefore becomes an element which the parties must have known, and had in mind, along with the other circumstances surrounding the execution of the contract, and hence that upon their failure to negative its application, it becomes important and controlling in interpretation.

We agree, as is stated on page 32, under the *Williams vs. Ninemire* citation, that a clear, cer-

tain and distinctive contract is not subject to modification, by proof of custom and disposes of all customs and practices by its own terms. The contract in the case at bar has been the object of intense study, by laymen and lawyers. It not only fails to speak clearly and certainly on the question of cancellation, by operation of a strike provision, but it fails to speak at all to the effect of cancellation, or to use appellee's phrase, "permanent excuse for performance." It therefore leaves the parties on the particular point, with the generally known custom and usage of the trade as the sole guide to the question of responsibility to make shipments after the termination of the strike. Why isn't it logical, since the parties have excused delay by strike, to permit custom and usage to settle the question, particularly where that custom and usage, as previously demonstrated, is in harmony with the general law on the subject? We would say this answered the requirements of the Williams case, wherein it states: "such proof is then admissible only for the purpose of finding out what the contract really was, and not to overthrow it."

On page 33 of appellee's brief, appellant is charged with making the contention that the contract is ambiguous, and that the custom is not in conflict with the terms thereof. It is either ambiguous or silent. The contract may be definite with regard to all other facts and features thereof, as the present one is, and still be ambiguous or

silent in regard to the particular issue involved in the present case.

Counsel next states that these contracts contain force majeure clauses, excusing the seller from performance if prevented by specified uncontrollable causes. If this is true, of course, the appellee is entitled to prevail on this point, because it is the issue in the case.

It has been determined, upon the reading of proof, that this brief will exceed in length, the twenty pages permitted under the court's rule. If it be felt by the court, the brief should not be extended beyond this limit, we conclude at this point with the proposition, as stated in our original brief, that the law regarding interpretation of the contract, and applicability of custom and usage requires a reversal of the trial court.

It is felt, however, that the additional matters, which have not been covered heretofore, will be of material assistance to the court, and if the limitation of the rule does not prevent, it is earnestly requested that the following appendix be considered by the court.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX

The proposition is next advanced by the appellee, that if it be assumed that the contracts be uncertain or incomplete as an original proposition, the fact remains that judicial interpretation has supplied the answer, and completed the contracts just as in the case of the endorser to a promissory note.

It was said, that no one for a moment would contend that it would be possible to introduce evidence that it was a custom and usage in a particular locality, or in a particular trade; that such an endorsement would subject the endorser to no obligation whatever. We have not made any extended search of authorities on this last proposition. In order, however, for the two cases to be similar, the controversy must have been between the endorser and the endorsee, so that the elements of holder in due course and good faith be eliminated. It then becomes a simple proposition. It is always possible, as between the immediate parties to such a transaction, to show that the endorsement was a limited one, as for example, that it was made simply for the purpose of transferring title. 8 *Corpus Juris,* page 378, Section 560, note 58; 8 *Corpus Juris,* page 357, Section 535; 8 *Corpus Juris,* pages 737 to 742, Sections 1015 and 1016. It has been repeatedly held that defenses are available to an endorsor, where the transferree does not hold as a bona fide holder, why not in the case at bar? A defense might arise by reason

of contemporaneously executed documents. It has been many times held, that custom and usage does not violate the parole evidence rule, that it simply supplies a term to the contract, which the parties are assumed to have had in mind. If, to come back to appellee's example, there *actually exists* a custom and usage affixing a different responsibility to such an endorsement, then it becomes simply an agreement of the parties, that the law has no right to tamper with, and so we assume the burden of saying that in a similar case we would contend that known general custom and usage would be available, to determine the obligation assumed by an endorser.

As a matter of history the Negotiable Instruments Law itself is the outgrowth of the usages of merchants. When, if ever, we reach a point where there has been a statute adopted, as in the case of negotiable instruments, fixing the rights and duties of the parties regarding performance after a strike it may be that the example cited will be appropriate. Even so, it will not help appellee's case, as it is permitted under the Negotiable Instruments Act, as between the parties, to show any contemporaneous and collateral agreement in defense which does not violate the parole evidence rule. Since custom and usage does not violate the rule, there is no reason in law or logic why it couldn't be shown to explain the intended obligation of an endorser.

At first blush, appellee's example seemed logical. We believe, however, it seemed so only because the example selected was one in which custom and usage, to establish an obligation different than that fixed by the negotiable instrument law, is so remote a possibility as to confuse the principle.

ANALYSES OF TESTIMONY IN RE CUSTOM

Turning now to the testimony of the witnesses, and the appellee's analyses thereof, on page 38 of the appellee's brief will be found a quotation of testimony of Mr. Penketh. Counsel has picked one word out of the quoted portion, the word "usually." Its brief states that the use of this one word is sufficient to qualify the entire quotation. A search of the transcript of testimony does not indicate that counsel found any qualification in the statement when the witness testified. Certainly the point was not developed on cross-examination. It is more likely that the word is used casually, without regard to any limitation counsel now seems to invest it with. The witness does not use the same nicety of expression, nor choose words so carefully when giving testimony, as counsel may do in writing a brief analytical of that testimony. We submit that in fact the whole of this witness' testimony does not indicate any limitation upon the applicability of the custom.

The testimony of Mr. Darling is next sought to be limited, on account of his statement, "It would

depend entirely upon the quantity involved, and the conditions that prevail after the strike or other impediment had been removed." We fail to see how his failure to state a custom with regard to the length of time that might be allowed under a custom for performance after the impediment had been removed can limit his testimony that the custom and usage contended for exists. We make no claim that custom fixes the time for performance after the impediment is removed. Our claim is simply that there is a requirement of performance under custom and usage, within a reasonable time after the impediment is removed, and this statement applies equally to the testimony of Mr. Haig, quoted on page 40 of appellee's brief, regarding the custom of 30 days. Counsel's analysis of this testimony, by saying "that the custom described is simply one to make delivery of the goods and it is not stated that there is any custom *requiring* delivery to be made," seems a mere quibble. If this distinction, based upon the use of the word "requiring" is a proper distinction, and one which is limiting in its effect, it would seem that it would have been noticed by counsel, and emphasized and developed in cross-examination. However, such was not the case. We believe the general testimony of this witness is clearly indicative of the requirement for delivery after the impediment is removed.

On page 46 of appellee's brief, the point is made that to permit a witness to testify what the general

custom is, in so far as it relates to clauses of similar import and tenor, to the one at bar, is to permit the witness himself to judge the similarity and legal effect, rather than the court. We believe this overlooks our primary contention on this subject matter. There is a custom and usage, so we contend, calling for deliveries after excusable impediments.

This custom and usage does not exist by reason of some contract, whatever its wording may be, but exists independently of any contract, and becomes a part of such contract, and is an overpowering term thereof, unless the particular contract negatives its application. Counsel does not seem to be able to get away from the thought that we are contending that the custom and usage overrides express provisions of the contract, or those necessarily implied therefrom, on the subject of performance, after termination of excusable impediments. This is not at all our contention. If custom and usage becomes a part of the contract, then it is in the contract just as effectively as if it were printed therein in words. Before such a term of the contract can be held to be non-applicable, it must of necessity be negatived by the use of language clearly indicating such an intention. Let us point out once and finally, that we make no claim that the custom and usage varies the terms of these contracts. Rather our claim definitely is that there is no discrepancy or inconsistency between the contract, and the custom and usage.

When a witness says, "True, I know of no custom and usage affecting a contract containing the language now before the court. However, I know of custom and usage on similar contracts," he is simply saying that there is a doctrine of custom and usage recognized in the trade, in contracts covering the purchase and sale of logs, as the one at bar. It is of no consequence, that he may not know, or the court may not have the identical contract before it, as all the court would be permitted to do, in any event, in the face of the existence of such custom, would be to determine whether or not the particular contract negatived its application in that particular case.

Respectively submitted,

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Attorneys for Appellant

No. 9197

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. MALONEY, Collector of Internal Revenue, Portland, Oregon,

Appellant,

vs.

PORTLAND ASSOCIATES, INC., a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

FILED

JUL - 6 1939

PAUL P. O'BRIEN,
CLERK

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 60-6-26-39

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

CARL C. DONAUGH, United States Attorney; M. B. STRAYER, Assistant United States Attorney; J. MASON DILLARD, Assistant United States Attorney; U. S. Court House, Portland, Oregon, and THOMAS R. WINTER, Special Attorney, Bureau of Internal Revenue, Federal Office Building, Seattle, Washington, for Appellant.

GRIFFITH, PECK & COKE; CLARENCE D. PHILLIPS, Electric Building, Portland, Oregon, for Appellee.

In the District Court of the United States for the District of Oregon

July Term, 1937

Be it remembered, That on the 16th day of August, 1937, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit: [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon

L 12934

PORTLAND ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

J. W. MALONEY, Collector of Internal Revenue, Portland, Oregon,
Defendant.

COMPLAINT

Comes now the above plaintiff and for cause of action against the above defendant, complains and alleges as follows, to-wit:

I.

That at all times herein mentioned the above named plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and that said corporation was voluntarily dissolved by resolution as of December 24, 1935, and since said date, and at the present time, is engaged in the process of liquidation, the collection of its debts and distribution of assets to its stockholders.

II.

That at all times herein mentioned, the above defendant was and now is the duly appointed, qual-

ified and acting Collector of Internal Revenue for the District of Oregon having his office in the City of Portland, Multnomah County, Oregon. [2]

III.

That on or about October of 1933, the above defendant made and levied an assessment for documentary stamp taxes against the above plaintiff in the sum of $9,772.29 together with a penalty of 5 per centum in the amount of $488.61, together with interest thereon in the sum of $123.42, making a total assessment of $10,384.32, and thereafter on or about the 11th day of December, 1933, the above defendant gave notice of said assessment to the above plaintiff.

IV.

That on or about November 1933, the above defendant made an assessment against the above plaintiff on account of documentary stamp taxes in the sum of $205.60 together with a penalty of 5 per centum in the sum of $10.28, together with interest thereon in the sum of $2.60, making a total assessment of $218.48, together with an additional amount of interest in the sum of $41.29, making a total assessment of $259.77, and that the said defendant thereafter on or about the 11th day of December, 1933, gave notice of said assessment to the above plaintiff.

V.

That thereafter the above defendant caused notice of tax lien, on account of said assessment, to

be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone County, Montana, the above plaintiff having properly situated in said counties in Wyoming and Montana.

VI.

That thereafter and on or about the 2nd day of March, 1935, the above plaintiff paid to the above defendant, under protest, the [3] sum of $2,975.81; that thereafter and on or about November 2, 1935, the above plaintiff paid to the above defendant, under protest, the sum of $10,474.30, being the balance claimed by the above defendant to be due and owing for documentary stamp taxes, and that thereafter the above defendant caused the liens hereinbefore referred to to be satisfied and discharged of record.

VII.

That thereafter and on or about the 14th day of November, 1935, the above plaintiff filed with the above defendant its claim for refund in the sum of $7,783.19 together with the sum of $65.60, plus penalties and interest thereon, making a total including penalties and interest claimed as a refund in the sum of $10,298.18.

VIII.

That thereafter and on or about the 18th day of February, 1937, the Commissioner of Internal Revenue of the United States authorized a refund

upon said claim for refund in the amount of $2,950.00 and rejected plaintiff's claim for refund in the sum of $7,347.28; that thereafter on or about the 2nd day of March, 1937, the above defendant, in accordance with said ruling of the Commissioner upon said claim for refund, paid to the above plaintiff as a refund the sum of $3,254.91; being the amount of said refund together with penalties and interest upon the amount since date of payment.

IX.

That more than six months have elapsed since the date of the filing of said claim for refund and that the Commissioner of Internal Revenue on or about February 18, 1937, notified the above plaintiff by letter that said claim for refund had been rejected in the amount of $7,347.28. [4]

X.

That said documentary stamp taxes were erroneously and unlawfully collected by the above defendant from the above plaintiff and that there is now due and owing from the above defendant to the above plaintiff the sum of $7,347.28, together with interest thereon at the rate of 6 per centum per annum from November 2, 1935.

XI.

That there is attached hereto, and referred to herein by reference for the purposes of this complaint and made a part hereof, a full, true and cor-

rect copy of the schedules which were attached to the claim for refund in the above matter showing an analysis of the issuance of certificates in the above matter, showing the number of shares, the amount of tax assessed and paid upon each item, the correct tax as claimed by the taxpayer, the above plaintiff, to which there has been added a statement showing the amount of refund and the particular items for which refund has been made.

XII.

That the above plaintiff claims that the documentary stamp taxes assessed and collected from the above plaintiff were erroneously and unlawfully collected for the following reasons:

(a) That the tax assessed and collected by the defendant in the sum of Thirty-one Hundred ($3100.00) Dollars as shown in item 5 on page 2 of said Exhibit attached hereto was a tax which was claimed by the defendant on account of an alleged implied transfer of 155,000 shares from stockholders to the voting trustees who acted as trustees under a Voting Trust Agreement dated May 1, 1931. When the capital stock of the Company was increased by the amount of 155,000 shares, said Voting Trust Agreement was in full force and effect and it was provided by the Directors of said Corporation that [5] the said capital stock should be subject to the terms of said Voting Trust Agreement and should only be issued, sold or disposed of under the terms of said Voting Trust Agree-

ment. There was no transfer from the Beneficial owners to the Voting Trustees and the original issue to the Voting Trustees was taxed under item 4 in said exhibit and the tax thereon paid, and that the additional tax of $3100.00 was therefore erroneous and unlawful.

(b) The tax of $50.00 as shown in item 8 of said exhibit was claimed by defendant on account of an alleged transfer from C. R. Griffith to the Treasury of said corporation. Under the terms of such transfer the said C. R. Griffith made a donation of 249,996 shares of stock to the Corporation subject to the Voting Trust Agreement dated as of May 1, 1931, which Voting Trust Agreement was to be executed prior to the time of delivery of said shares of stock and that the said item of tax on 249,996 shares was and is taxes under item 2 in said exhibit.

(c) The item of tax of $140.00 as claimed by the above defendant under item 12 in said exhibit attached hereto claimed by the defendant to be an account of a transfer of 7,000 shares as of June 20, 1932. No such taxable transfer appears on any of the records of the above plaintiff and no such transfer was made.

(d) That the above defendant claimed a tax of $120.00 as shown in item 13 in the exhibit attached hereto of which amount the sum of $60.00 has been refunded and the amount not refunded is claimed by the above defendant to represent a tax upon the transfer of 3,000 shares subsequent to June 21,

1932. The records of the above plaintiff show no such item of transfer and the plaintiff claims that no such transfer was ever made.

(e) That the items of tax shown in items 14 and 15 of the [6] exhibit attached hereto are claimed by the above defendant to represent a tax under the Voting Trust Certificates under the Voting Trust dated May 1, 1931. It is claimed by the above plaintiff that all of the items, except those items upon which the plaintiff admits that a tax is payable, as shown by said exhibit, are taxes claimed upon an original issue of Voting Trust Certificates under the terms of said Voting Trust Agreement of May 1, 1931. That under the statutes of the United States and under the regulations of the Treasury Department, in force at time of issuance of said certificates, an original issue of Voting Trust Certificates is not taxable and that said certificates have already been taxed in the items shown as numbers I, II and IV, and also in item V if said item V is taxable.

Wherefore, Plaintiff prays for judgment against the above defendant in the sum of $7,347.28 together with interest thereon at the rate of 6 per centum per annum from November 2, 1935, together with plaintiff's costs and disbursements herein.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

(Signed) CLARENCE D. PHILLIPS.

[7]

TAX UNDER ACCOUNT # "Misc. Oct. 1933. 4017".

Tax assessed	$9772.29	
Amount paid on Tax March 2, 1935	1989.10	
Balance	7783.19	
5% penalty	488.61	
Interest to November 2, 1935	1942.73	
TOTAL TAX PAID UNDER PROTEST November 2, 1935		$10,214.53

TAX UNDER ACCOUNT "Misc. Nov. 1935"

Amount Assessed	$ 205.60	
Penalty of 5%	10.28	
Interest from December 21, 1933 to January 29, 1934	2.60	
TOTAL	218.48	
Additional interest to Nov. 2, 1935	41.29	
TOTAL TAX		$ 259.77
GRAND TOTAL		$10,474.30

[8]

EXHIBIT "A"

ANALYSIS OF TAX CLAIMED TO BE DUE

	No. Shares	Tax Assessed and paid	Correct Tax as Claimed by Taxpayer	Refund Allowed and Paid
1. Stock Certificates Nos. 1 to 5	350,000	$ 175.20	$ 175.20	$
2. Transfers to Trustees Cert. Nos. 5 to 8 Inc.	349,995	70.00	70.00	
3. Certificates 9 & 10 Trans. from Trustees to Directors	2	.04	.04	
4. Increase in capital, Original issue	155,000	77.50	77.50	
5. Issues to Trustees	155,000	3100.00	......	
6. Transfer, C. R. Griffith to M. R. Swift	15,000	3.00	3.00	
7. Trans., C. R. Griffith to Casing Head Gas & Oil Co.	60,000	12.00	12.00	
8. Trans., C. R. Griffith to Treasury	249,996	50.00	......	
9. Trans., Casing Head Gas & Oil Co. to E. M. Steele	5,000	100.00	100.00	
10. E. M. Steele to Title & Trust Co., et al., Trans.	2,500	50.00	......	50.00
11. Right to receive by Stockholders of Big Horn Oil & Refining Co.	37,000	740.00	.....	740.00
12. Transfer as of June 20, 1932,	7,000	140.00	....	
13. Transfers subsequent to June 21, 1932	3,000	120.00	.....	60.00
14. Trust Certificates, 1 to 150 Inc., $1.00 par Certificates 151 to 390, Inc., no par (See Schedules attached)		5134.55	1275.64	1450.00
		9772.29	1713.38	
15. Trust Cert. No. 404 to 417 Inc. (See Schedules attached hereto)		205.60	140.00	
		$9977.89	$1853.38	$2300.00

[9]

EXPLANATION OF ITEMS

1. Tax correct.
2. Tax correct.
3. Tax correct.
4. Tax correct.
5. We understand that this tax item of $3100.00 is based upon an implied transfer from stockholders to the trustees under the voting trust. In this case there was no transfer from the owners of stock to the trustees of the 155,000 shares. At the time the capital stock of the corporation was changed to no par stock and the number of shares increased, it was provided by the resolutions of increase in the capital stock which were adopted by the stockholders and by the directors at meetings held on September 22, 1931, that each and every share of the increase of capital stock issued, sold or disposed of shall be under and subject to all of the terms and conditions of the voting trust agreement dated May 1, 1931, and that only voting trust certificates should be issued to the beneficial owners. In other words, the restrictions placed by the stockholders and directors of the corporation made it possible only to sell the 155,000 shares to the voting trustees for the benefit of this beneficial owners. In this situation there would be no transfer from the beneficial owners to the trustees, but the issue was direct to the trustees as fiduciaries for the beneficial owners. The original issue of this number of shares as issued to the trustees is taxed under item No. 4 above.

6. Tax correct.

7. Tax correct.

8. Transfer of 249,996 shares was not made by C. R. Griffith to the treasury, but under the terms of that transfer, which was in connection with the conditional subscription of C. R. Griffith, it was provided that the donation by C. R. Griffith of the 249,996 shares should be donated to the corporation, subject, however, to a voting trust agreement to be executed prior to the time of the delivery of the stock. The voting trust agreeemnt was executed and the 249,996 shares are included and taxed in item No. 2 above.

9. Tax correct.

10. The records of the Portland Associates do not disclose any transfer from E. M. Steele to Title and Trust Company, et al. Our conversations [10] with the representative of the Collector of Internal Revenue indicate that items 9 and 10 were included to make up part of the difference between 60,000 shares authorized to be issued to Casing Head Gas & Oil Company and the 50,000 shares actually issued to Casing Head Gas & Oil Company, 50,000 shares were actually issued to Casing Head Gas & Oil Company and taxed under item No. 14. An additional 5000 shares were issued and taxed as item No. 9. The remaining 5000 shares have never been issued.

11. In this transaction the Big Horn Oil & Refining Company, a corporation, did not sell the

assets of the corporation to Portland Associates, Inc. Portland Associates, Inc. purchased the stock of Big Horn Oil & Refining Company from the Stockholders. If there were any transfers or rights to receive among any stockholders of Big Horn Oil & Refining Company, such tax would not be assessable against Portland Associates, Inc.

12. This item was not definitely designated in the report of the examining officer, and we find no taxable transfer on the records of Portland Associates, Inc.

13. This item was not definitely designated in the report of the examining officer and we find no taxable transfer on the records of Portland Associates, Inc. (See schedules attached).

14. The reduction in the tax on this item is chiefly due to the reason that the original issue of voting trust certificates was taxed. An original issue of voting trust certificates is not taxable (See Article 29 of Regulations 71). (See schedules attached.) **[11]**

ANALYSIS OF VOTING TRUST CERTIFICATES TAXED UNDER ITEM 14.

Trust Cert. Nos.	To Whom Issued:	Description of Issue		Number Shares		Tax Assessed	Correct Tax as claimed by Taxpayer
1.	Otis B. Wright	Original	Issue	1500	$	.30	....
2.	E. E. Cohen	"	"	3000		.60	....
3.	E. W. Battleson	"	"	250		.06	....
4.	E. W. Battleson	"	"	250		.06	....
5.	E. W. Battleson	"	"	250		.06	....
6.	E. W. Battleson	"	"	250		.06	....
7.	E. W. Battleson	"	"	500		.10	....
8.	E. W. Battleson	"	"	500		.10	....
9.	E. W. Battleson	"	"	500		.10	....
10.	E. W. Battleson	"	"	500		.10	....
11.	E. W. Battleson	"	"	500		.10	....
12.	E. W. Battleson	"	"	500		.10	....
13.	E. W. Battleson	"	"	500		.10	....
14.	E. W. Battleson	"	"	500		.10	....
15.	E. W. Battleson	"	"	500		.10	....
16.	E. W. Battleson	"	"	500		.10	....
17.	E. W. Battleson	"	"	500		.10	....
18.	E. W. Battleson	"	"	1000		.20	....
19.	E. W. Battleson	"	"	1000		.20	....
20.	E. W. Battleson	"	"	1000		.20	....
21.	E. W. Battleson	"	"	1000		.20	....
22.	E. W. Battleson	"	"	1000		.20	....
23.	E. W. Battleson	"	"	1000		.20	....
24.	E. W. Battleson	"	"	1000		.20	....
25.	E. W. Battleson	"	"	1000		.20	....
26.	E. W. Battleson	"	"	1000		.20	....
27.	E. W. Battleson	"	"	1000		.20	....
28.	E. W. Battleson	"	"	1000		.20	....
29.	E. W. Battleson	"	"	1000		.20	....
30.	E. W. Battleson	"	"	1000		.20	....
31.	C. R. Griffith	"	"	16125		.04	....
32.	Franklin T. Griffith	"	"	7500		1.50	....
33.	John H. Lothrop	"	"	4000		.80	....
34.	W. A. Lothrop	"	"	350		.08	....
35.	L. Underdahl	"	"	5000		1.00	....
36.	Robert S. Brandon	"	"	2800		.56	....

Trust Cert. Nos.	To Whom Issued	Description of Issue		Number Shares	Tax Assessed	Correct TTax As claimed by Taxpayre
37.	Kerr Investment Co.	Original Issue		5000	1.00	....
38.	Franklin T. Griffith	"	"	6000	1.20	....
39.	C. R. Griffith	"	"	3000	....	....
40.	Wm. Cavanaugh	Cancelled		500	....	....
41.	Erma Lucille Bither	Original Issue		500	.10	....
42.	C. E. Dant	"	"	2000	.40	....
43.	M. F. Swift	"	"	5000	....	....
44.	M. F. Swift	"	"	5000	....	....
45.	M. F. Swift	"	"	5000	....	....
						[12]
46.	Otis B. Wight	Original Issue		3000	.60	....
47.	Otis B. Wight	"	"	3000	.60	....
48.	L. Underdahl	"	"	3000	.60	....
49.	L. Underdahl	"	"	3000	.60	....
50.	Franklin T. Griffith	"	"	5000	1.00	....
51.	Franklin T. Griffith	"	"	5000	1.00	....
52.	Franklin T. Griffith	"	"	5000	1.00	....
53.	C. R. Griffith	"	"	3000	....	....
54.	H. F. Waechter	"	"	10000	2.00	....
55.	H. F. Waechter	"	"	10000	2.00	....
56.	H. F. Waechter	"	"	10000	2.00	....
57.	J. H. Lothrop	"	"	1000	.20	....
58.	O. B. Coldwell	"	"	3000	.60	....
59.	Franklin T. Griffith	"	"	6000	1.20	....
60.	Jack Barde	"	"	7500	1.50	....
61.	Jack Barde	"	"	5000	1.00	....
62.	W. R. Evans	"	"	1000	.20	....
63.	A. M. Work	"	"	2000	.40	....
64.	E. H. Bollinger	"	"	1000	.20	....
65.	H. K. Senour	"	"	1000	.20	....
66.	Kerr Investment Co.	"	"	5000	1.00	....
67.	C. R. Griffith	"	"	3000	....	....
68.	Geo. W. Baldwin	"	"	1000	.20	....
69.	Clarence D. Phillips	"	"	500	.10	....
70.	E. I. Snyder	"	"	250	.05	....
71.	O. C. Coldwell	"	"	300	.06	....
72.	A. J. Johnstone	"	"	1000	.20	....
73.	G. O. Durkee	"	"	1000	.20	....
74.	Walter Brenton	"	"	500	.10	....
75.	W. H. Lines	"	"	1000	.20	....

Trust Cert. Nos.	To Whom Issued:	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
76.	Fred Cooper	Original Issue	1000	.20	....
77.	G. C. Fields	" "	1000	.20	....
78.	W. S. Babson	" "	1000	.20	....
79.	R. M. Townsend	" "	500	.10	....
80.	R. E. Brennan	" "	500	.10	....
81.	W. J. Morris	" "	500	.10	....
82.	Claire H. Lines	" "	1000	.20	....
83.	E. G. Jarvis	" "	1000	.20	....
84.	John S. Coke	" "	1000	.20	....
85.	Earl S. Nelson	" "	1000	.20	....
86.	O. S. Krogstad	" "	500	.10	....
87.	G. P. Lumsdon & wife	" "	200	.04	....
88.	Carlton B. Short	" "	500	.10	....
89.	B. F. Boynton	" "	500	.10	....
90.	A. J. Bussey	" "	200	.04	....
91.	Cora O. Kelley	" "	1000	.20	....
92.	Joseph A. Boyce	" "	200	.04	....
93.	P. J. Maher	" "	500	.10	....

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Trust Cert. Nos.	To Whom Issued:	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
94.	George Sullivan	Original Issue	400	.08	....
95.	R. R. Robley	" "	200	.04	....
96.	Lawrence Launidson	Void	200	....	....
97.	Thomas Pumfrey	Original Issue	1000	.20	....
98.	C. P. Osborne	" "	400	.08	....
99.	Jean M. Osborne	" "	400	.08	....
100.	Ruth A. Osborne	" "	400	.08	....
101.	Franklin T. Griffith	" "	10225	2.06	....
102.	W. R. Evans	" "	1000	.20	....
103.	R. W. Shepherd	" "	250	.06	....
104.	Frederick L. Swanson	" "	100	.02	....
105.	David Alvis Wright	" "	200	.04	....
106.	Joseph Alexander Brownson	" "	400	.08	....
107.	Wm. Munroe Hamilton	" "	1200	.24	....
108.	Wm. Andrew Merriorr	" "	100	.02	....
109.	Franklin T. Griffith	" "	1125	.24	....
110.	G. Spencer Harrisdale	" "	2000	.40	....
111.	Jean M. Osborne	" "	400	.08	....
112.	C. P. Osborne	" "	400	.08	....
113.	Lawrence Lawridsen	" "	200	.04	....

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
114.	O. B. Coldwell	Original Issue	1000	.20	....
115.	Christobel R. Leiter	“ “	2000	.40	....
116.	J. D. Perry, et al	“ “	500	.10	....
117.	Etta P. Griffith	“ “	1750	.36	....
118.	Franklin T. Griffith	“ “	15750	3.16	....
119.	Chas. Lebold	Transfer	500	.10	$ .10
120.	A. J. Peaper	Transfer	1000	.20	.20
121.	H. K. Senour	Transfer	1000	.20	.20
122.	Frank Krennin	Transfer	220	.06	.06
123.	M. F. Swift	No Transfer	2280	....	....
124.	H. K. Senour	Transfer	500	.10	.10
125.	Andrew Kerr	Transfer	1500	.30	.30
126.	Kerr Investment Co.	Transfer	3000	.60	.60
127.	Kerr Investment Co.	Original Issue	2500	.50	....
128.	Barde Steel Co.	Void	2500	....	....
129.	Jack Barde	Original Issue	2500	.50	....
130.	Nina Grenthorne	Transfer	500	.10	.10
131.	M. F. Swift	No Transfer	1780	....	....
132.	Casing Head Gas & Oil Co.	Original Issue	50000	....	....
133.	Henry S. Mears	Transfer	5251	1.06	1.06
134.	E. M. Steel	Transfer	15947	3.20	3.18
135.	Bernice Baldwin	Transfer	100	.02	.02
136.	Robert F. Brandon	No Transfer	2700	....	....
137.	H. K. Senour	Transfer	1000	.20	.20
138.	H. K. Senour	Transfer	1000	.20	.20
139.	H. K. Senour	Transfer	1000	.20	.20

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Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
140.	H. K. Senour	Transfer	1500	.30	.30
141.	Andrew Kerr	Transfer	1500	.30	.30
142.	E. M. Steel	No Transfer	9947	....	....
143.	C. H. Griffith	Transfer	610	.14	.14
144.	E. M. Steel	No Transfer	9337	....	....
145.	A. E. Rosen	Transfer	200	.04	.04
146.	R. C. Rosen	Transfer	200	.04	.04
147.	C. H. Griffith	No Transfer	210	....	....
148.	Andrew Kerr	Transfer	2500	.50	.50
149.	E. M. Steel	No Transfer	6837	....	....
150.	—Void—	Specimen	....	....	....
151.	F. S. Elfring	Transfer	1000	20.00	20.00

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
152.	Regner W. Kuelberg	Transfer	100	2.00	2.00
153.	Engel Engelson	"	250	5.00	5.00
154.	Kay H. Olesen	"	500	10.00	10.00
155.	E. M. Steel	No Transfer	250	....	....
156.	E. M. Steel	No Transfer	4737	....	....
157.	E. M. Steel	Original Issue	5753	115.08	....
158.	Kerr Investment Co.	" "	10000	200.00	....
159.	J. C. Ainsworth	Transfer	88	1.76	1.76
160.	Vidor Andrew	"	263	5.26	5.26
161.	E. M. Steel	"	875	17.50	17.50
162.	E. W. Battleson	"	4375	87.50	87.50
163.	David Boisseau	"	350	7.00	7.00
164.	D. W. Borg	"	2538	50.76	50.76
165.	John Borg	"	263	5.26	5.26
166.	Robert B. Brandon	"	2634	52.68	52.68
167.	Wm. Cavanaugh	"	35	.70	.70
168.	Blaine B. Coles	"	1489	29.78	29.78
169.	Arthur Cook	"	325	6.50	6.50
170.	H. H. Hughes	"	200	4.00	4.00
171.	Walter M. Cook	"	1314	26.28	26.28
172.	Bert H. Custer	"	175	3.50	3.50
173.	R. M. Dooly	"	263	5.26	5.26
174.	F. S. Elfning	"	132	2.64	2.64
175.	G. & Mildred Francis	"	70	1.40	1.40
176.	Charles R. Griffith	"	2450	49.00	49.00
177.	John Hagan	"	263	5.26	5.26
178.	V. L. Hamlin	"	438	8.76	8.76
179.	Wm. Hanson	"	132	2.62	2.62
180.	J. H. Harris	"	35	.70	.70
181.	C. M. Harrison	"	175	3.50	3.50
182.	Calvin Heilig	"	875	17.50	17.50
183.	Victor Hermonson	"	263	5.26	5.26
184.	R. D. Hoyt	"	263	5.26	5.26

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Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
185.	Herman Isaacson	Transfer	525	10.50	10.50
186.	G. Orlo Jefferson	"	875	17.50	17.50
187.	C. R. Johnson	"	525	10.50	10.50
188.	Regner W. Kuelberg	"	53	1.06	1.06
189.	R. W. McLennen	"	53	1.06	1.06
190.	Ludwig F. Meyer	"	438	8.76	8.76

Trust Cert. Nos.	To Whom Issued:	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
191.	J. A. Nelson	"	630	12.60	12.60
192.	Charles E. Oliver	"	175	3.50	3.50
193.	A. Parker	"	263	5.26	5.26
194.	James Williams	"	35	.70	.70
195.	Adam T. Smith	"	158	3.16	3.16
196.	John T. Strom	"	525	10.50	10.50
197.	Theodore Thye	"	438	8.76	8.76
198.	Geo. Trofton	"	10	.20	.20
199.	Alfred Wicke	"	3378	67.56	67.56
200.	Otis B. Wight	"	350	3.00	3.00
201.	Mary F. Winter	"	88	1.76	1.76
202.	E. W. Battleson	"	1050	21.00	21.00
203.	E. M. Steel	No Transfer	3687	....	....
204.	Wm. Gillis	Original Issue	1500	30.00	....
205.	Ralph Wiesprecht	" "	1500	30.00	....
206.	Urfan Keppinger	" "	1500	30.00	....
207.	Minnie Oliver	" "	1400	28.00	....
208.	Katherine Piggott	" "	325	6.50	....
209.	M. F. Swift	No Transfer	1380	....	....
210.	Arthur Cook	Transfer	300	6.00	6.00
211.	Blaine B. Coles	"	100	2.00	2.00
212.	Arthur Cook	"	500	10.00	10.00
213.	E. M. Steell	No Transfer	3187	....	....
214.	Frank Keenan	Transfer	250	5.00	5.00
215.	E. M. Steell	No Transfer	2937	....	....
216.	Frank Keeman	Transfer	250	5.00	5.00
217.	Charles E. Lebold	"	825	16.50	16.50
218.	E. M. Steell	No Transfer	1862	....	....
219.	E. T. Grimes	Transfer	500	10.00	10.00
220.	Jean E. Grimes	"	300	6.00	6.00
221.	Robert B. Brandon	No Transfer	1900	....	....
222.	S. M. Mears	Original Issue	945	18.90	....
223.	Georgiana McGrath	" "	200	4.00	....
224.	Verda L. Moore	Transfer	25	.50	.50
225.	E. M. Steell	No Transfer	1837	....	....
226.	Geo. Ateyeh	Transfer	500	10.00	10.00
227.	W. E. Stewart	"	500	10.00	10.00
228.	E. M. Steell	No Transfer	837	16.74	....
229.	Prescott V. Cookingham	Transfer	50	1.00	1.00

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax As claimed by Taxpayer
230.	A. J. Peaper	Transfer	200	4.00	4.00
231.	E. M. Steell	"	900	18.00	18.00
232.	C. C. Clarkson	"	1000	20.00	20.00
233.	I. D. Murfield	Original Issue	100	2.00	....

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Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax As claimed by Taxpayer
234.	H. C. Barber	" "	100	2.00	....
235.	H. B. Davis	" "	250	5.00	....
236.	N. A. Leach	" "	500	10.00	....
237.	Frank Kieman	Transfer	280	5.60	5.60
238.	Chas. E. Lebond	"	175	3.50	3.50
239.	M. F. Swift	No Transfer	925	....	....
240.	Thelma Cacy	Transfer	20	.40	.40
241.	Robt. A. Wood	"	50	1.00	1.00
242.	Chas. M. Newman, et al	"	75	1.50	1.50
243.	C. H. Griffith	No Transfer	65	....	....
244.	E. W. Battleson	Original Issue	10000	200.00	....
245.	Franklin T. Griffith	" "	800	16.00	....
246.	E. W. Battleson	" "	2500	50.00	....
247.	Franklin T. Griffith	" "	2500	50.00	....
248.	H. T. Shelley	Transfer	333	6.66	6.66
249.	E. M. Steele	No Transfer	567	....	....
250.	C. B. Short	Transfer	100	2.00	2.00
251.	C. P. Osborne	"	100	2.00	2.00
252.	Raymond E. Brennan	"	200	4.00	4.00
253.	Geo. O. Durkee	"	100	2.00	2.00
254.	Thomas Pumpfrey	"	100	2.00	2.00
255.	J. M. Gillham	"	200	4.00	4.00
356.	E. M. Steele	No Transfer	37	....	....
257.	E. D. Searing	Transfer	100	2.00	2.00
258.	Ben Rossiter	"	100	2.00	2.00
259.	Arthur Cook	No Transfer	300	....	....
260.	Donald McKay	Transfer	150	3.00	3.00
261.	Geo. P. Laurenden, et ux.	Transfer	450	9.00	9.00
262.	Arthur Dorais, et ux.	"	150	3.00	3.00
263.	Henry S. Mears	No Transfer	4501	....	....
264.	C. C. Clarkson	Transfer	1000	20.00	20.00
265.	Henry S. Mears	"	750	15.00	15.00
266.	Arthur Cook	"	4003	80.06	80.06
267.	R. B. Brandon	"	1100	22.00	22.00
268.	Arthur Cook	No Transfer	2903	....	....

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax As claimed by Taxpayer
269.	Arthur Dorais, et ux.	Transfer	50	1.00	1.00
270.	C. H. Griffith	No Transfer	15	....	....
271.	C. C. Clarkson	Transfer	150	3.00	3.00
272.	Wm. Ingold	"	150	3.00	3.00
273.	Engel Engelson	"	100	2.00	2.00
274.	Arthur Cook	No Transfer	2803	....	....
275.	Thos. Pumfrey	Transfer	400	8.00	8.00
276.	A. J. Bussey	Original Issue	100	2.00	....
277.	Chas. E. Freeburg	" "	100	2.00	....
278.	W. T. Wilmot	" "	100	2.00	....
279.	Andrew Weinberger	" "	100	2.00	....
280.	Raymond E. Brennan	" "	100	2.00	....
281.	John M. Mason	" "	100	2.00	....
282.	F. C. Colcord	" "	50	1.00	....

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Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer	Refund
283.	R. J. Moore	Original Issue	50	1.00	....	
284.	Chas. W. Foote	" "	200	4.00	....	
285.	Louis Rosenblatt	Transfer	1000	20.00	20.00	
286.	Arthur Cook	No Transfer	1803	....	10.00	
287.	E. W. Stewart	Transfer	500	10.00	10.00	
288.	Arthur Cook	Void	1503	....	....	
289.	Arthur Cook	No Transfer	1303	....	....	
290.	Andrew Kerr	Original Issue	4500	90.00	....	
291.	C. C. Clarkson	Transfer	400	8.00	8.00	
292.	Arthur Cook	No Transfer	200	....	....	
293.	Arthur Cook	" "	703	....	....	....
294.	Jeff Ringle	Original Issue	1000	20.00	....	20.00
295.	Jeff. Ringle	" "	1000	20.00	....	20.00
296.	E. J. Fleming	" "	2500	50.00	....	50.00
297.	E. J. Fleming	" "	2500	50.00	....	50.00
298.	E. J. Fleming	" "	2500	50.00	....	50.00
299.	E. J. Fleming	" "	2500	50.00	....	50.00
300.	Mrs. E. E. Fleming	" "	1000	20.00	....	20.00
301.	Mrs. E. E. Fleming	" "	1000	20.00	....	20.00
302.	T. R. Graham	" "	500	10.00	....	10.00
303.	T. R. Graham	" "	500	10.00	....	10.00
304.	J. E. Simon	" "	500	10.00	....	10.00

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer	Refund
305.	R. J. O'Malley	Original Issue	1000	20.00	....	20.00
306.	R. J. O'Malley	" "	1000	20.00	....	20.00
307.	J. G. Everett	" "	5000	100.00	....	100.00
308.	J. G. Everett	" "	5000	100.00	....	100.00
309.	J. G. Everett	" "	5000	100.00	....	100.00
310.	J. G. Everett	" "	1000	20.00	....	20.00
311.	J. G. Everett	" "	1000	20.00	....	20.00
312.	J. G. Everett	" "	1000	20.00	....	20.00
313.	J. G. Everett	" "	1000	20.00	....	20.00
314.	G. H. Downs	" "	1000	20.00	....	20.00
315.	Paul Stock	" "	10000	200.00	....	....
316.	Paul Stock	" "	10000	200.00	....	....
317.	Paul Stock	" "	10000	200.00	....	....
318.	Paul Stock	" "	10000	200.00	....	....
319.	Paul Stock	" "	10000	200.00	....	....
320.	Paul Stock	" "	1000	20.00	....	....
321.	Paul Stock	" "	1000	20.00	....	....
322.	Paul Stock	" "	1000	20.00	....	....
323.	Paul Stock	" "	1000	20.00	....	....
324.	Paul Stock	" "	1000	20.00	....	....
325.	Paul Stock	" "	1000	20.00	....	....
326.	Paul Stock	" "	1000	20.00	....	....
327.	Paul Stock	" "	500	10.00	....	....
328.	Paul Stock	" "	5000	100.00	....	100.00
329.	Paul Stock	" "	5000	100.00	....	100.00
330.	Paul Stock	" "	5000	100.00	....	100.00
331.	Paul Stock	" "	5000	100.00	....	100.00

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Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer	Refund
332.	Paul Stock	Original Issue	5000	100.00	....	100.00
333.	Paul Stock	" "	5000	100.00	....	100.00
334.	Paul Stock	" "	5000	100.00	....	100.00
335.	Calvin Heilig	Transfer	500	10.00	10.00	....
336.	R. B. Brandon	No Transfer	600	....	....	....
337.	Erma L. Bither	Transfer	665	13.30	13.30	....
338.	Arthur Cook	No Transfer	38	....	....	....
339.	Calvin Heilig	Original Issue	135	2.50	....	....
340.	V. L. Hamlin	" "	311	6.22	....	....
341.	Ted Thye	" "	312	6.24	....	....
342.	J. H. Lothrop	" "	500	10.00	....	....
343.	C. C. Clarkson	Transfer	400	8.00	8.00	....

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer	Refund
344.	Arthur Cook	Transfer	475	9.50	9.50	....
345.	Lucile DeWitte	Transfer	563	11.26	11.26	....
346.	Erma L. Bither	Transfer	135	2.70	2.70	....
347.	Glen Francis Co.	Void	1802	....	....	....
348.	Louis E. Meyer	Transfer	350	7.00	7.00	....
349.	R. B. Brandon	No Transfer	256	....	....	....
350.	Glen Francis Co.	(Transfer) Void	1802	....	....	....
351.	Louise C. Fleming	Transfer	1000	20.00	20.00	....
352.	E. J. Fleming	Transfer	2500	50.00	50.00	....
353.	F. C. Colcord	Transfer	50	1.00	1.00	....
354.	M. F. Swift	Void	875	....	....	....
355.	Earl H. Mody	Transfer	233	4.68	4.66	....
356.	I. D. Murfield	Transfer	150	3.00	3.00	....
357.	Frank Coffenberry	Transfer	250	5.00	5.00	....
358.	R. J. Moore	Transfer	50	1.00	1.00	....
359.	N. A. Leach	Original Issue	500	10.00	....	....
360.	O. P. Taylor	" "	700	14.00	....	....
361.	C. R. Griffith	" "	8775	175.00	....	....
362.	Robin Reed	Transfer	300	6.00	6.00	....
363.	M. F. Swift	Transfer	267	5.34	5.34	....
364.	Agnes Kieman	Transfer	780	15.60	15.60	....
365.	John W. Moore	Transfer	100	2.00	2.00	....
366.	M. F. Swift	Void-error	359	....	....	....
367.	M. F. Swift	No Transfer	25	....	....	....
368.	Julia F. Brock	Transfer	100	2.00	2.00	....
369.	Arthur Cook	No Transfer	225	....	....	....
370.	Walter Dickey	Void-error	750	....	....	....
371.	Laura Griffith	Transfer	500	10.00	10.00	....
372.	Robert B. Brandon	No Transfer	1384	....	....	....
373.	C. C. Clarkson	Transfer	750	15.00	15.00	....
374.	E. M. Steell	Original Issue	5000	100.00	....	....
375.	W. E. Stewart	Transfer	500	10.00	10.00	....
376.	Vivian Cooley	Transfer	52	1.04	1.04	....
377.	John T. McGregor	Transfer	131	2.62	2.62	....
378.	R. B. Brandon	No Transfer	67	....	....	....
379.	Blaine B. Coles	No Transfer	675	....	....	....
380.	Blaine B. Coles	No Transfer	814	....	....	....

Trust Cert. Nos.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed	Correct Tax as claimed by Taxpayer
381.	Erma L. Bither	Transfer	665	13.30	13.30
382.	Robert S. Brandon	No Transfer	719	....	....
383.	Paul Stock	No Transfer	2500	....	....
384.	Paul Stock	No Transfer	1000	....	....
385.	Jack Barde	No Transfer	1165	....	....
386.	Oliver Seifferle	Transfer	637	12.74	12.74
387.	Edward Hirstel	Transfer	500	10.00	10.00
388.	Fred J. Meindle	Transfer	500	10.00	10.00
389.	Henry McKnight	Transfer	200	4.00	4.00
390.	C. H. Griffith	Transfer		2.00	2.00
				$5134.55	$1275.64

ANALYSIS OF VOTING TRUST CERTIFICATES TAXED UNDER ITEM 15

Cert. No.	To Whom Issued	Description of Issue	Number Shares	Tax Assessed and Paid	Correct Tax as claimed by Taxpayer
409.	B. P. Taylor	No Transfer—correction of error	700	28.00	....
410.	E. J. Fleming	Transfer	3500	140.00	140.00
411.	C. H. Griffith	Original Issue	1000	40.00	....
412.	C. H. Griffith	" "	1000	40.00	....
413.	C. H. Griffith	" "	500	20.00	....
414.	C. H. Griffith	" "	500	20.00	....
415.	C. H. Griffith	" "	250	10.00	....
416.	C. H. Griffith	" "	240	9.60	....
417.	C. C. Clarkson	No Transfer	100	4.00	....
				$311.60	$140.00

Tax originally assessed,	$311.60
Less stamps purchased,	106.00
Tax finally assessed and paid	$205.60
CORRECT TAX	140.00
AMOUNT illegally and erroneously assessed and paid under protest	$ 65.60

[20]

State of Oregon,
County of Multnomah—ss.

I, Clarence D. Phillips, being first duly sworn, depose and say that I am the Secretary of Portland Associates, Inc., the plaintiff in the above entitled cause: and that the foregoing Complaint is true, as I verily believe.

(Signed) CLARENCE D. PHILLIPS

Subscribed and sworn to before me this 16th day of August, 1937.

O. S. KROGSTAD,
Notary Public for the State of Oregon.
My commission expires 6-17-1938.

[Notarial Seal]

Filed August 16, 1937
G. H. MARSH, Clerk
By F. L. BUCK, Chief Deputy. [21]

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Pursuant to leave of court, upon the request of the above plaintiff, an Order was made and entered herein on October 1, 1937, granting permission to the above plaintiff to file Supplemental Complaint herein, the said plaintiff does hereby file its Supplemental Complaint in the above entitled cause and for additional cause of action against the above defendant complains and alleges as follows, to-wit:

I.

That at all times herein mentioned the above named plaintiff was a corporation organized and existing under by virtue of the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and that said corporation was voluntarily dissolved by resolution as of December 24, 1935, and since said date, and at the present time, is engaged in the process of liquidation, the collection of its debts and distribution of assets to its stockholders. [23]

II.

That at all times herein mentioned, the above defendant was and now is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Oregon having his office in the City of Portland, Multnomah County, Oregon.

III.

That on or about January 11, 1936, the above defendant made and levied an assessment for documentary stamp taxes against the above plaintiff in the sum of Twenty-Eight Hundred ($2800.00) Dollars and thereafter, and on or about January 22, 1936, the above defendant made demand upon the above plaintiff for the payment of said tax, together with penalties and interest thereon and thereafter and on or about the 8th day of February subsequent notice and demand was given by said defendant to the above plaintiff and pursuant thereto and on February 16, 1937, the above plaintiff paid to the above defendant, under protest, the

sum of $2800.00 together with penalty and interest thereon in the sum of $175.81 or a total payment of $2,975.81 on account of said documentary stamp taxes.

IV.

That thereafter and on or about February 17, 1937 the above plaintiff filed with the above defendant its claim for refund in the sum of $2,975.81, including $2800.00 documentary stamp taxes and $175.81 interest and penalties and claimed a refund in the total amount of $2,975.81. [24]

V.

That thereafter and on or about the 18th day of September, 1937, the Commissioner of Internal Revenue of the United States, rejected plaintiff's claim for refund in the total amount of $2,975.81.

VI.

That more than six months have elapsed since the date of the filing of said claim for refund and that the said claim for refund has now been rejected in the total amount.

VII.

That said documentary stamp taxes were erroneously and unlawfully collected by the above defendant from the above plaintiff and that there is now due and owing from the above defendant to the above plaintiff, the sum of $2,975.81, together with interest thereon at the rate of 6% per annum from February 16, 1937, in addition to the amounts claimed by the above plaintiff, in its original complaint filed herein.

VIII.

That said documentary stamp taxes were claimed by the above defendant on account of purported options given by the above plaintiff to various individuals, that said purported options were unilateral in their character and only cited upon the minute records of the corporation, never acted upon by the individuals, nor accepted by the individuals whom the same were purported to have been granted, and without any consideration therefor, and that there was no agreement between the above plaintiff and the said individuals for the sale [25] or purchase of any stock of the above plaintiff, upon which a documentary stamp tax could lawfully be assessed.

IX.

That there is attached hereto and referred to herein by reference for the purposes of this Supplemental Complaint, and made a part hereof, a full, true and correct copy of the claim for refund in the above matter and the schedules attached thereto.

X.

That the above entitled plaintiff was unable to include the above claim in its original complaint filed herein for the reason that the claim refund had not yet been denied by the Commissioner of Internal Revenue and that the claim for refund was denied subsequent to the filing of the original complaint herein.

Wherefore, Plaintiff prays for judgment in accordance with the prayer of its original complaint

filed herein and in addition thereto for judgment in favor of the plaintiff and against the defendant in the additional amount of $2975.81 together with interest thereon at the rate of 6% per annum from February 16, 1937, together with plaintiff's costs and disbursements herein.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff [26]

"EXHIBIT A"

CLAIM

To be filed with the collector where assessment was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

......Refund of Tax Illegally Collected.

......Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

......Abatement of Tax Assessed (not applicable to estate or income taxes.)

State of Oregon,
County of Multnomah—ss.

Name of taxpayer or purchaser of stamps Portland Associates, Inc., a corporation of Oregon.

Business address 505 Electric Bldg., Portland, Oregon.

Residence..

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed No return filed—Documentary Stamp Taxes

2. Period (if for income tax, make separate form for each taxable year) from........................, 19......, to........................, 19......

3. Character of assessment or tax Documentary Stamp Taxes

4. Amount of assessment, $2800.00 and int., dates of payment February 16, 1937

5. Date stamps were purchased from the Government ....

6. Amount to be refunded 2800.00 plus interest—total $2975.81

7. Amount to be abated (not applicable to income or estate taxes).. $...............................

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 19............, on February 16, 1939

The deponent verily believes that this claim should be allowed for the following reasons:

See separate sheets attached hereto referred to herein and by reference for the purposes of this claim for refund, made a part hereof.

[Signed] PORTLAND ASSOCIATES, INC.
FRANKLIN T. GRIFFITH,
President

Sworn to and subscribed before me this .... day of ...., 193

CLARENCE D. PHILLIPS, Notary Public

[27]

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Printer's Note: Form not filled out.]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Printer's Note: Form not filled out.]

....

Collector of Internal Revenue District

Committe on Claims

Amount claimed......	$......................	....
Amount allowed......	$......................	....
Amount rejected......	$......................	....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or at-

torney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

The assessments for documentary stamp taxes amounted to $2800.00. It is the contention of the claimant and taxpayer that the sum of $2800.00 was erroneously and illegally assessed and collected and payment of said taxes with penalty and interest was made by the taxpayer under protest pursuant to notice of levy in that the taxes for which re-

fund is claimed herein were not due or legally assessable or taxable under the statutes of the United States providing for documentary stamp tax.

The claim for refund is based upon the purported transfers or options to Paul Stock, 15,000 shares, E. W. Battleson, 10,000 shares and Franklin T. Griffith, 10,000 shares, total, 35,000 shares. The only evidence of these options is an authorization found in the minutes of the Corporation whereby the Corporation granted to each of the above individuals options to purchase the respective number of shares as above set forth at One ($1.00) Dollar per share. The options were never exercised and the stock was never issued in accordance with the purported options and no option contract was entered into between the Corporation and the parties named. It was nothing more than a recitation in the minutes. Nothing was paid by any of said individuals to the Corporation on account of said stock. It is the contention of the claimant and taxpayer that a unilateral offer on behalf of the corporation which was never accepted by the individuals is not taxable.

The claimant and taxpayer also contends that even in the event that options were taxable that they were not taxable at the rate of four cents per share but only taxable at the most at the rate of two cents per share. The recitations in the minutes of this Corporation are found in the minutes of an adjourned meeting of the Board of Directors

held on January 27, 1932. All taxable transfers of stock prior to June 21, 1932, carried a rate of two cents per share. [28]

the 35,000 shares of stock represented by voting trust certificates which were delivered by Paul Stock to the Corporation during 1935 was not a taxable transfer and the claimant and taxpayer contends that it was not a taxable transfer. This stock was delivered to the Corporation for cancellation and it is the contention of the claimant and taxpayer that stock delivered to the issuing Corporation for cancellation is not a taxable transfer.

State of Oregon,
County of Multnomah—ss.

I, Clarence D. Phillips being first duly sworn, depose and say that I am the Assistant Secretary of Portland Associates, Inc. in the above entitled action; and that the foregoing Supplemental Complaint is true, as I verily believe.

CLARENCE D. PHILLIPS

Subscribed and sworn to before me this 7th day of October, 1937.

[Seal] EARL S. NELSON,
Notary Public for the State of Oregon.

My commission expires Dec. 4, 1940

Filed October 8, 1937
G. H. MARSH, Clerk
By F. L. BUCK, Chief Deputy. [29]

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT

Comes now the above named defendant, J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, by his attorney, Carl C. Donaugh, United States Attorney for the District of Oregon, and, for answer to the complaint filed herein by the plaintiff, generally and specifically denies each and every allegation contained in said complaint except such as are hereinafter specifically admitted, qualified or denied, and says:

I.

Answering paragraph I of the plaintiff's complaint filed herein, the defendant says that he has no knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and the defendant, therefore, denies the allegations contained in said paragraph I, except that the defendant admits that at all times herein mentioned the above named plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon.

II.

Defendant admits the allegations contained in paragraph II of the said complaint.

III.

Defendant denies the allegations contained in paragraph III of the [31] said complaint. Further answering paragraph III of the said complaint, the defendant says that in October, 1933, the Commissioner of Internal Revenue assessed the plaintiff documentary stamp taxes in the sum of $9,772.29, and in November, 1935, assessed a penalty thereon of 5 percent thereof in the amount of $488.61 and interest in the amount of $1,942.73.

IV.

Defendant denies the allegations contained in paragraph IV of the said complaint. Further answering paragraph IV of the said complaint, the defendant says that in November, 1933, the Commissioner of Internal Revenue assessed the plaintiff documentary stamp taxes in the sum of $205.60, and that in November, 1935, the Commissioner assessed the plaintiff a penalty thereon of 5 percent in the sum of $10.28, together with interest thereon in the sum of $2.60, and additional interest on stamp taxes previously assessed in the sum of $41.29.

V.

Defendant admits the allegations contained in paragraph V of the said complaint.

VI.

Answering paragraph VI of the said complaint, the defendant denies that on or about March 2,

1935, the plaintiff paid to the defendant the sum of $2,975.81. Further answering said paragraph VI, the defendant admits that on or about November 2, 1935, the plaintiff paid to this defendant, under protest, the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes, and that thereafter this defendant caused the liens hereinbefore referred to to be satisfied and discharged of record. Further answering said paragraph VI of the complaint, the defendant says that on March 5, 1935, the plaintiff paid to him, as Collector of Internal Revenue, under protest, the sum of $1,989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue.

VII.

Defendant denies the allegations contained in paragraph VII of the [32] said complaint. For further answer to paragraph VII of the said complaint, the defendant says that on November 15, 1935, the plaintiff filed with the defendant, as Collector of Internal Revenue, a claim for refund of documentary stamp taxes, penalties and interest, previously paid, in the sum of $10,298.18; that of the said amount claimed to be refundable, the sum of $8,124.51 represented stamp taxes previously assessed and paid and $2,173.67 thereof represented penalties and interest previously assessed and paid on said stamp taxes.

VIII.

Defendant admits the allegations contained in paragraph VIII of the said complaint, except that the defendant denies that the amount of the refund authorized and determined by the Commissioner of Internal Revenue was $2,950, as alleged in said paragraph, and says that the amount of the said refund authorized by the said Commissioner was $2,950.90. Further answering paragraph VIII of the said complaint, the defendant says that of the sum of $2,950.90 which the Commissioner allowed and authorized be refunded to the plaintiff, $2,300 represented a refund of documentary stamp taxes previously assessed by the Commissioner and paid by the plaintiff and $650.90 represented a refund of penalties and interest previously assessed by the Commissioner and paid by the said plaintiff.

IX.

Defendant admits the allegations contained in paragraph IX of the said complaint.

X.

Answering paragraph X of the said complaint, the defendant says that the allegations therein contained are conclusions of law to which he is not required to make answer herein, and, to the extent that any of the allegations contained in said paragraph X are allegations of fact each and every such allegation the defendant specifically denies.

XI.

Defendant denies the allegations contained in paragraph XI of the said complaint.

XII.

Answering paragraph XII of the said complaint, and the subparagraphs [33] thereof designated (a), (b), (c), (d) and (e), the defendant says that the allegations contained therein are conclusions of law and argument, to which he is not required to reply herein, and, to the extent that all or any of the statements contained in said paragraph XII, or any of the said subparagraphs thereof, may be allegations of fact, all and each of said allegations the defendant specifically denies.

Wherefore, the defendant prays upon consideration hereof that the plaintiff's complaint be dismissed and that the defendant be awarded his costs herein, and for such other and further relief as may be proper in the premises.

CARL C. DONAUGH,
United States Attorney for
the District of Oregon

By M. B. STRAYER,
Assistant United States
Attorney.

State of Oregon,
County of Multnomah—ss.

I, M. B. Strayer, being first duly sworn, depose and say: That I am a duly appointed, qualified and

acting Assistant United States Attorney for the District of Oregon; that I have read the foregoing Answer and that the allegations therein contained are true as I verily believe.

M. B. STRAYER,
Assistant United States
Attorney.

Subscribed and sworn to before me this 10th day of November, 1937.

[Seal] ALLAN HART,
Notary Public for Oregon
My Commission expires: Nov.
18, 1939

Filed November 10, 1937
G. H. MARSH, Clerk
By F. L. BUCK, Chief Deputy. [34]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO ANSWER OF DEFENDANT

Comes now the above plaintiff and in Reply to the Answer of the defendant filed herein, admits, denies and alleges as follows, to-wit:

I.

Admits the affirmative allegations made by the above defendant in paragraphs III, IV, VI, VII and VIII of defendant's answer.

II.

Except as hereinbefore expressly admitted, stated or qualified and except as may be alleged in plaintiff's complaint this plaintiff denies each and every other affirmative allegation contained in defendant's answer.

Wherefore, Plaintiff having fully replied to defendant's answer prays that judgment be for the plaintiff in accordance with the prayer of plaintiff's complaint filed herein.

GRIFFITH, PECK & COKE
CLARENCE D. PHILLIPS
Of Plaintiff's Attorneys. [36]

State of Oregon,
County of Multnomah—ss.

I, Clarence D. Phillips being first duly sworn, depose and say that I am the Secretary of Portland Associates, Inc., in the above entitled action; and that the foregoing Plaintiff's Reply to Answer of Defendant is true, as I verily believe.

CLARENCE D. PHILLIPS

Subscribed and sworn to before me this 22nd day of November, 193......

[Seal] JOHN M. COKE,
Notary Public for the State of Oregon.
My commission expires Nov. 19th, 1938.

Filed November 22, 1937
G. H. MARSH, Clerk
By F. L. BUCK, Chief Deputy. [37]

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT TO PLAINTIFF'S SUPPLEMENTAL COMPLAINT

Comes now the above named defendant, J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, by his attorney, Carl C. Donaugh, United States Attorney for the District of Oregon, and, for answer to the supplemental complaint filed herein by the plaintiff, generally and specifically denies each and every allegation contained in said supplemental complaint except such as are hereinafter specifically admitted, qualified or denied, and says:

I.

Answering paragraph I of the plaintiff's supplemental complaint filed herein, the defendant says that he has no knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and the defendant, therefore, denies the allegations contained in said paragraph I, except that the defendant admits that at all times herein mentioned the abovenamed plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Oregon, having [39] its principal place of business in Portland, Multnomah County, Oregon.

II.

Defendant admits the allegations contained in paragraph II of the said supplemental complaint.

III.

Defendant denies the allegations contained in paragraph III of the said supplemental complaint. Further answering paragraph III of the said supplemental complaint, defendant says that on or about January 11, 1936, the Commissioner of Internal Revenue assessed against the plaintiff documentary stamp taxes in the sum of $2,800.00 which, together with interest thereon of $175.81, was paid to the defendant as Collector of Internal Revenue on February 17, 1937.

IV.

Defendant denies the allegations contained in paragraph IV of said supplemental complaint. For further answer to said paragraph IV of said supplemental complaint, the defendant says that on February 18, 1937, the plaintiff filed with the defendant as Collector of Internal Revenue, a claim for refund for documentary stamp taxes and interest previously paid in the sum of $2,975.81.

V.

Defendant admits the allegations contained in paragraph V and VI of the said supplemental complaint.

VI.

Answering paragraph VII of the said supplemental complaint, the defendant says that the alle-

gations therein contained are conclusions of law to which he is not required to make answer herein, and to the extent that any of the allegations contained in said paragraph VII are allegations of fact, each and every such allegation the defendant specifi- [40] cally denies.

VII.

Answering Paragraph VIII of the said supplemental complaint, the defendant says that the allegations contained are conclusions of law and argument to which he is not required to reply herein and to the extent that all or any of the statements contained in said Paragraph VIII may be allegations of fact, all, and each of said allegations the defendant specifically denies.

VIII.

Answering paragraph IX of the said supplemental complaint, defendant admits that there is attached to the said supplemental complaint a copy of claim for refund but each and every other affirmative allegation the defendant specifically denies.

IX.

Defendant denies the allegations contained in paragraph X of the said supplemental complaint.

Wherefore, the defendant prays upon consideration hereof that the plaintiff's supplemental complaint be dismissed and that the defendant be

awarded his costs herein, and for such other and further relief as may be proper in the premises.

CARL C. DONAUGH,
United States Attorney for the District of Oregon.
By M. B. STRAYER,
Asst. United States Attorney

State of Oregon,
County of Multnomah—ss.

I, M. B. Strayer, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Assistant [41] United States Attorney for the District of Oregon; that I have read the foregoing Answer of the Defendant to Plaintiff's Supplemental Complaint and that the allegations therein contained are true as I verily believe.

M. B. STRAYER,
Assistant United States Attorney

Subscribed and sworn to before me this 31st day of January, 1938.

[Seal] ALLAN HART,
Notary Public for Oregon.
My commission expires: Nov. 18, 1939

Filed January 31, 1938
G. H. MARSH, Clerk
By F. L. BUCK, Chief Deputy. [42]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO ANSWER OF DEFENDANT TO PLAINTIFF'S SUPPLEMENTAL COMPLAINT.

Comes now the above plaintiff and in reply to the answer of the defendant to plaintiff's supplemental complaint filed herein, admits, denies and alleges as follows, to-wit:

I.

Admits the affirmative allegations made by the above defendant, in paragraphs I, III, IV, of defendant's answer to plaintiff's supplemental complaint.

II.

Except as hereinbefore expressly admitted, stated or qualified and except as may be alleged in plaintiff's supplemental complaint, this plaintiff denies each and every other affirmative allegation contained in defendant's said answer.

Wherefore, Plaintiff having fully replied to defendant's answer to plaintiff's supplemental [44] complaint, prays that judgment be for the plaintiff in accordance with the prayer of plaintiff's complaint and plaintiff's supplemental complaint filed herein.

CLARENCE D. PHILLIPS
of Attorneys for Plaintiff

State of Oregon
County of Multnomah.—ss.

I, Clarence D. Phillips being first duly sworn, depose and say that I am the Secretary of Portland Associates, Inc., plaintiff in the above entitled action; and that the foregoing Reply is true, as I verily believe.

CLARENCE D. PHILLIPS

Subscribed and sworn to before me this 1st day of February, 1938.

[Seal] EARL S. NELSON

Notary Public for the State of Oregon. My commission expires Dec. 4, 1940.

Filed February 1, 1938.
G. H. Marsh, Clerk
By F. L. Buck, Chief Deputy. [45]

[Title of District Court and Cause.]

STIPULATION.

It is hereby stipulated by and between the parties to the above-entitled cause and their respective attorneys that the said cause may be tried to the Judge of this Court without the intervention of a jury, trial by jury herein being expressly waived, and that the Judge shall make and enter a special finding of the facts concerning the issues raised by the pleadings in said cause and a special statement

of his conclusions of law with respect thereto. Either party may except to such findings of fact and/or conclusions of law, or any part of the same.

Dated this 31 day of March, 1938.

CLARENCE D. PHILLIPS
Attorney for Plaintiff.
CARL C. DONAUGH
United States Attorney.
By M. B, STRAYER
Ass't United States Attorney.
THOMAS R. WINTER
Special Attorney, Bureau of Internal Revenue.
Attorneys for Defendant.

Filed March 31, 1938.
G. H. Marsh, Clerk. [47]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT

Comes now the above plaintiff and moves the Court for a judgment in favor of the plaintiff and against the defendant in the sum of Seven Thousand Three Hundred Forty-seven and 28/100 Dollars ($7,347.28), together with interest thereon at the rate of six per cent. per annum from November 2, 1935, together with the further sum of Two Thousand Nine Hundred Seventy-five and 81/100 Dollars ($2,975.81), together with interest thereon at

the rate of six per cent, per annum from February 16, 1937, together with plaintiff's cross and disbursements herein.

GRIFFITH, PECK & COKE
CLARENCE D. PHILLIPS
Attorneys for Plaintiff.

State of Oregon
County of Multnomah.—ss.

I, Clarence D. Phillips one of attorneys for Plaintiff in the within entitled cause do hereby certify that the foregoing Motion is in my opinion well founded in law.

CLARENCE D. PHILLIPS

Filed April 8, 1938
G. H. Marsh, Clerk
By R. DeMott, Deputy. [49]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT.

Comes now the above-named defendant, J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, by Carl C. Donaugh, United States Attorney for the District of Oregon, M. B. Strayer, Assistant United States Attorney for said District, and Thomas R. Winter, General Counsel Representative for the Bureau of Internal Revenue, his attorneys, and moves the Court for judgment in favor of the defendant and against the plaintiff dismissing

the plaintiff's complaint and plaintiff's costs on each of the grounds hereinafter stated as follows:

I.

Under the law, the pleadings and the evidence, with every inference of fact that may be fairly drawn therefrom, the plaintiff has failed to prove a cause of action against the defendant in any form.

II.

Under the law, the pleadings and the evidence, with every inference of fact that may be fairly drawn therefrom, are not sufficient to sustain findings of fact in favor of the plaintiff and against the defendant in any form. [51]

III.

Under the law, the pleadings and evidence, with every inference of fact that may be fairly drawn therefrom, are not sufficient to sustain conclusions of law in favor of the plaintiff and against the defendant in any form.

IV.

Under the law, the pleadings and evidence, with every inference of fact that may be fairly drawn therefrom, are not sufficient to sustain a judgment in favor of the plaintiff and against the defendant in any form.

V.

The record does not contain any substantial evidence to sustain a judgment in favor of the plaintiff and against the defendant in any form.

Wherefore, the defendant asks that in the event this motion for judgment is overruled or not sustained, that he be allowed exceptions thereto as and on each of the grounds therein stated, and further exceptions to all orders, findings, and conclusions entered or made by the court adverse to or against defendant, and any order of judgment thereon and entered in said cause against defendant.

CARL C. DONAUGH
United States Attorney
M. B. STRAYER
Ass't United States Attorney

THOMAS R. WINTER, General Counsel
Representative, Bureau of Internal Revenue

Filed March 31, 1938
G. H. Marsh, Clerk
By R. DeMott, Deputy. [52]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the Hon. Claude McCulloch, Judge of the above entitled Court:

Comes now the above plaintiff, by Griffith, Peck & Coke and Clarence D. Phillips, its Attorneys, and based upon the evidence in the above cause requests

and moves the Court to make and adopt as its own the following:

FINDINGS OF FACT

I.

That at all times herein mentioned the above named plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and that said corporation was voluntarily dissolved by resolution as of December 24, 1935, and since said date, and at the present time, is engaged in the process of liquidation, the collection of its debts and distribution of assets to its stockholders. [54]

II.

That at all times herein mentioned, the above defendant was and now is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Oregon having his office in the City of Portland, Multnomah County, Oregon.

III.

That on or about October of 1933, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the above plaintiff in the sum of $9,772.29, together with a penalty of 5 per cent in the amount of $488.61, together with interest thereon in the sum of $123.42, making a total assessment of $10,384.32, and thereafter on or about the 11th day of Decem-

ber, 1933, the above defendant gave notice of said assessment to the above plaintiff.

IV.

That on or about November, 1933, the Commissioner of Internal Revenue made an assessment against the above plaintiff on account of documentary stamp taxes in the sum of $205.60 together with a penalty of 5 per centum in the sum of $10.28, together with interest thereon in the sum of $2.60, making a total assessment of $218.48, together with an additional amount of interest in the sum of $41.29, making a total assessment of $259.77, and that the said defendant thereafter on or about the 11th day of December, 1933, gave notice of said assessment to the above plaintiff. [55]

V.

That thereafter the above defendant caused notice of tax lien, on account of said assessment, to be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone County, Montana, the above plaintiff having property situated in said counties in Wyoming and Montana.

VI.

That on March 5, 1935, the plaintiff paid to the above defendant under protest the sum of $1989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue; that on or about November 2, 1935, the plaintiff paid to the

above defendant under protest the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes, and that thereafter the above defendant caused the said liens hereinbefore referred to to be satisfied and discharged of record.

VII.

That on November 15, 1935 the plaintiff filed with the defendant, as Collector of Internal Revenue, a claim for refund of documentary stamp taxes, penalties and interest previously paid in the sum of $10,298.18; that of the said amount claimed to be refundable the sum of $8,124.51 represented stamp taxes previously assessed and paid, and $2,173.67 thereof represented penalties and interest previously assessed and paid on said stamp taxes.

VIII.

That thereafter, and on or about the 18th day [56] of February, 1937, the Commissioner of Internal Revenue of the United States authorized a refund upon said claim for refund in the amount of $2,950.90, and rejected plaintiff's claim for refund in the sum of $7,347.28; that thereafter, and on or about the 2nd day of March, 1937, the above defendant, in accordance with said ruling of the Commissioner upon said claim for refund, paid to the above plaintiff, as a refund, the sum of $2,950.90, which represented a refund of documentary stamp taxes previously assessed by the Commissioner in the sum of $2300.00, which was paid by the plaintiff, and

$650.90 represented the refund of penalties and interest previously assessed by the Commissioner and paid by the plaintiff.

IX.

That prior to filing complaint herein more than six months elapsed since the date of the filing of said claim for refund, and that the Commissioner of Internal Revenue, on or about February 18, 1937, notified the above plaintiff by letter that said claim for refund had been rejected in the amount of $7,347.28.

X.

That on or about January 11, 1936, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the above plaintiff in the sum of $2800.00, and thereafter, and on or about January 22, 1936, the above defendant made demand upon the above plaintiff for the payment of said tax, together with penalties and interest thereon and thereafter and on or about the 8th day of February subsequent notice and demand was given by said defendant to the above [57] plaintiff and pursuant thereto and on February 16, 1937, the above plaintiff paid to the above defendant, under protest, the sum of $2800.00, together with penalty and interest thereon in the sum of $175.81 or a total payment of $2,975.81 on account of said documentary stamp taxes.

XI.

That thereafter and on or about February 17, 1937 the above plaintiff filed with the above defendant its claim for refund in the sum of $2,975.81, including $2800.00 documentary stamp taxes and $175.81 interest and penalties and claimed a refund in the total amount of $2,975.81.

XII.

That thereafter and on or about the 18th day of September, 1937, the Commissioner of Internal Revenue of the United States, rejected plaintiff's claim for refund in the total amount of $2,975.81.

XIII.

That prior to filing complaint herein more than six months elapsed since the date of the filing of said claim for refund and that the said claim for refund has now been rejected in the total amount.

XIV.

That on April 6, 1931 plaintiff corporation was organized under the laws of the State of Oregon, with an authorized capital stock of 350,000 shares, having a par value of $1.00 per share; that on May 1, 1931 subscriptions were made to said capital stock as shown by the minute records of said corporations, in words [58] and figures as follows:

"C. R. GRIFFITH does hereby subscribe for 349,996 shares of the par value of $1.00 per share, aggregating $349,996.00 of PORTLAND ASSOCIATES, INC., an Oregon cor-

poration, and agrees to pay for the same by transferring and assigning to the corporation that certain indenture of lease entered into under day of March 13th, 1931 by and between Montana and Wyoming Oil Company as lessor and C. R. Griffith, trustee, as lessee, covering the following described real property in the county of Big Horn and state of Wyoming:

> The southwest (SW) quarter of the southeast (SE) quarter and the southeast (SE) quarter of the southwest (SW) quarter of Section 28 in township 56 north of range 97 west of the sixth principal meridian, containing 80 acres more or less

and by transferring and delivering to the corporation that certain drilling contract dated April 16th, 1931 and secured by said trustee and his associates for this corporation from Paul Stock of Cody, Wyoming as driller.

"The undersigned agrees that if this conditional subscription is accepted that he will donate 249,996 shares of said capital stock to the corporation for sale by it upon such terms and conditions as it may desire to sell the same or for use by it in any manner it desires, subject however to a voting trust agreement to be executed prior to the time said stock is delivered to this corporation. In the event this conditional subscription is accepted the undersigned directs that 60,000 shares of said stock be issued to Casing-Head Gas & Oil Co., that 15,000

shares of said stock be issued to M. F. Swift, that 25,000 shares of said stock be issued to C. R. Griffith, and that the remaining 249,996 shares be issued to the Secretary of Portland Associates, Inc. in trust for said corporation and such distribution as may from time to time be determined upon by the directors of said Portland Associates, Inc.

C. R. GRIFFITH

"We, the undersigned, do hereby subscribe for the number of shares of capital stock of Portland Associates, Inc. set after our names and agree to pay therefor at the rate of $1.00 per share upon call of said subscription.

Name	Number of Shares
Franklin T. Griffith	One
M. F. Swift	One
E. W. Battleson	One
S. M. Mears	One" [59]

XV.

That the stockholders of said corporation accepted the offer of C. R. Griffith at a meeting of stockholders held May 1, 1931, and the directors of said corporation accepted said offer at a directors' meeting held May 1, 1931.

XVI.

That certificate of stock No. 1 was issued to C. R. Griffith for 349,996 shares, and that certificates Nos. 2, 3, 4 and 5 were issued to Franklin T. Griffith,

S. M. Mears, E. W. Battleson and M. F. Swift for one share each, and that a documentary stamp tax was paid on the issuance of said certificates in the amount of $175.20; thereafter certificate No. 1 was endorsed and transferred by C. R. Griffith to Franklin T. Griffith, C. R. Griffith and E. M. Steell, Trustees, transferring to said Trustees 349,995 shares, and certificate No. 6 for said number of shares was issued to said Trustees and a transfer tax in the amount of $70.00 was paid thereon; that certificate No. 8 was a void certificate used as a specimen only; that certificate No. 9 was issued to Paul Stock for one share and certificate No. 10 was issued to H. K. Senor for one share, being transfers from the Trustees and a documentary stamp tax paid on such transfers in the sum of 4 cents.

XVII.

That a stamp tax was paid in the amount of $3.00 on the authorization of C. R. Griffith to transfer 15,000 shares to M. F. Swift, and that a documentary [60] stamp tax of $12.00 was assessed and paid on the authorization to transfer 60,000 shares to Casing-Head Gas & Oil Company.

XVIII.

That there was no transfer of stock from C. R. Griffith to Portland Associates, Inc. or to the treasury of said corporation, or to any one as an officer of said corporation.

XIX.

That on October 1, 1931 the Articles of Incorporation of the plaintiff were amended, changing and increasing the authorized capital stock of said corporation from 350,000 shares of the par value of $1.00 each, to 750,000 shares without par value, and there were issued one share of no par value for each share of $1.00 par value stock then outstanding.

XX.

That there was issued to Franklin T. Griffith, C. R. Griffith and E. M. Steell, as Trustees, certificate No. 7 representing 505,000 shares of the capital stock, which included 349,995 shares transferred to the Trustees above named by stock certificate No. 6 dated September 22, 1931, and the additional 155,005 shares were issued in addition thereto under authorization of the directors and stockholders of the corporation.

XXI.

That an original issue documentary stamp tax was paid upon said 155,000 shares in the sum of $77.50; that there was no transfer to the Trustees as shown by the records of said corporation other than the issuance [61] of said certificate above mentioned.

XXII.

That the original subscription of C. R. Griffith for 349,996 shares of the capital stock of said corporation was conditioned upon the creation of a voting trust, and a voting trust agreement was

made and entered into as of May 1, 1931 between all of the stockholders of Portland Associates, Inc. and Franklin T. Griffith, C. R. Griffith and E. M. Steell as voting trustees, and that all of the stock of said corporation (except directors' qualifying shares) was held under the terms of said voting trust agreement, and that the Title and Trust Company, Portland, Oregon, acted as depositary under said agreement, and acted as agent of the voting trustees; that the voting trustees sold voting trust certificates to various individuals and received the money therefor and paid the same into the treasury of the corporation, and the voting trustees caused to be issued to the purchasers of said certificates voting trust certificates; that the above plaintiff, Portland Associates, Inc., was not a party to said voting trust agreement, and the above plaintiff corporation did not issue or cause to be issued any of the voting trust certificates, and that said voting trust agreement was made for the benefit of the stockholders of said corporation, and that said voting trust agreement expressly provided that the entire outstanding capital stock of Portland Associates, except directors' qualifying shares, has been acquired and transferred to the Trustees upon the express understanding and agreement that all of said shares of capital [62] stock will be assigned and delivered to the Trustees, the said Trustees to hold and exercise the rights appertaining thereto under the terms of said agreement.

XXIII.

That no stock certificates have been issued by the above plaintiff corporation except stock certificates to the said voting trustees and directors' qualifying shares of one share each to each of the directors of said corporation; and that no person had any right to receive shares of stock in the above plaintiff corporation or certificates representing shares of stock issued by the above plaintiff corporation except said voting trustees and the directors qualifying, one share each.

XXIV.

That among other things there was assessed, levied against and collected from the above plaintiff a documentary stamp tax in the sum of $3100.00 as a transfer tax upon 155,000 shares of stock; that the records of said corporation do not show any transfer of 155,000 shares of the capital stock upon which such tax can be assessed, levied or collected.

XXV.

That among other things there was assessed, levied against and collected from the above plaintiff the sum of $50.00 documentary stamp tax on a transfer of stock from C. R. Griffith to the treasury of said corporation; that the records of said corporation do not show any transfer upon which such tax can be assessed, levied or collected. [63]

XXVI.

That among other things there was assessed, levied against and collected from the above plaintiff

a documentary stamp tax in the sum of $140.00 on purported transfers as of June 20, 1932; that the records of said corporation do not disclose any transfer of capital stock as of June 20, 1932 upon which said tax could be levied, assessed or collected.

XXVII.

That among other things there has been assessed and levied against and collected from said plaintiff corporation the sum of $120.00 upon a purported transfer subsequent to June 21, 1932, and that a refund has been made thereon in the sum of $60.00, leaving an assessment and collection on account thereof in the sum of $60.00; that the records of said corporation do not disclose any such transfer of capital stock upon which a documentary stamp tax could be assessed, levied or collected.

XXVIII.

That there has been assessed, levied against and collected from said corporation documentary stamp taxes on purported transfers of voting trust certificates, including a transfer tax on all of the voting trust certificates which are shown upon the voting trust certificate books to be original issues of voting trust certificates; that none of said voting trust certificates were issued by the above plaintiff corporation, and that none of said voting trust certificates were transferred by said corporation, nor did the above corporation transfer any right to receive said voting trust [64] certificates and that there was

no transfer of certificates or of the right to receive by the above plaintiff corporation upon said voting trust certificates listed in the voting trust certificate books as original issues upon which a tax could be assessed, levied or collected, and that said voting trust certificates are as follows:

> 1 to 38, inclusive, 41, 42, 46 to 52, inclusive, 54 to 66, inclusive, 68 to 118, inclusive, 127, 129, 157, 158, 204 to 208, inclusive, 222, 223, 233 to 236, inclusive, 244 to 247, inclusive, 276 to 284 inclusive, 290, 294 to 334, inclusive, 339 to 342, inclusive, 359, 360, 361, 374, 411 to 416, inclusive.

XXIX.

That documentary stamp tax on transfer was assessed and levied against and collected from the above corporation on certain voting trust certificates; that the records of said corporation show that there was no transfer of said certificates, which are numbered as follows:

> 228, 409 and 417.

XXX.

That the minute records of the plaintiff corporation show that at an adjourned meeting of the Board of Directors held January 27, 1932, resolutions were adopted as follows:

> RESOLVED that this corporation purchase all of the capital stock of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, in ac-

cordance with the proposition which has been submitted to this corporation by Mr. Paul Stock, representing the owners of all of the issued and outstanding stock of said Big Horn Oil & Refining Company, and in payment therefor issue 95,000 shares of the capital stock of this corporation as follows:

To Jeff Tingle	2,000 shares
E. J. Fleming	10,000 "
Mrs. E. E. Fleming	2,000 "
T. R. Graham	1,000 "

[65]

J. E. Simon	500 shares
R. J. O'Malley	2,000 "
J. G. Everett	19,000 "
G. H. Downs	1,000 "
Paul Stock	57,500 "

BE IT FURTHER RESOLVED that in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company as shown by the audit of the books of said company of December 31, 1931, to-wit:

Paul Stock	$3,929.45
E. J. Fleming	3,500.00
J. G. Everett, representing the claim of Associated Independent Dealers	1,331.72
J. G. Everett	1,000.00

this corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932."

"RESOLVED that in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share."

"RESOLVED that in consideration of his lending this corporation the sum of $10,000, Mr. Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share."

that no option agreements were made in writing between the corporation and the respective parties mentioned in said resolution; that no money was ever paid by any of the persons mentioned in said resolutions for the purchase of any stock as mentioned in said purported options, and that no stock was ever issued by the above plaintiff corporation to any of said persons on account of said purported options, and that none of said persons ever received any such stock and did not have the right to [66] receive such stock unless and until they should pay the money therefor; that there was no issuance or

transfer of any stock in said corporation to any of said persons which was subject to documentary stamp tax either for issuance or transfer on account of the recitations in said minutes.

XXXI.

That there is no competent evidence to show that there were 35,000 shares of capital stock of the plaintiff corporation assigned, transferred or delivered by Paul Stock to the above plaintiff corporation, and that there is no competent evidence that 35,000 shares of capital stock of said corporation were issued to said Paul Stock; that the only certificates which the record shows were issued to Paul Stock were voting trust certificates, and that the above plaintiff corporation was not a party to said voting trust agreement.

CONCLUSIONS OF LAW

I.

That the tax assessed and collected in the sum of $3100.00 on 155,000 shares was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to a refund thereof, together with interest and penalties levied and collected in addition thereto.

II.

That the tax assessed and collected in the sum of $50.00 on 249,996 shares of stock was assessed and

collected unlawfully and erroneously, and that the plaintiff is entitled to recover the said $50.00, together [67] with interest and penalties collected in addition thereto.

III.

That the tax assessed and collected in the sum of $140.00 on 7000 shares was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said $140.00, together with interest and penalties assessed and collected in addition thereto.

IV.

That the tax assessed and collected in the sum of $60.00 on 3000 shares was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said $60.00, together with any penalties and interest assessed and collected in addition thereto.

V.

That the tax assessed and collected in the sum of $2,408.91 on original issues of voting trust certificates was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said sum, together with any and all penalties and interest assessed and collected in addition thereto.

VI.

That the tax assessed and collected in the sum of $65.60 on voting trust certificates was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to recover the said sum of $65.60,

together with any and all penalties and interest assessed and collected in addition thereto. [68]

VII.

That the resolutions of the Board of Directors adopted January 27, 1932, referring to certain options, do not constitute taxable transfers under Schedule A-3 of Title VIII of the Revenue Act of 1926, and that the tax assessed and collected in the sum of $1400.00 thereon was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to recover said $1400.00, together with any and all penalties and interest assessed and collected in addition thereto.

VIII.

That the tax assessed and collected in the sum of $1400.00 on purported transfer of capital stock by Paul Stock was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to recover said sum of $1400.00, together with any and all penalties and interest assessed and collected in addition thereto.

IX.

That plaintiff is entitled to a judgment against the above defendant upon its original complaint in the sum of $7,347.28, together with interest thereon at the rate of 6 per cent. per annum from November 2, 1935, and upon its supplemental complaint for a judgment against the defendant in the sum of $2975.81, together with interest thereon at the

rate of 6 per cent. per annum from February 16, 1937, together with plaintiff's costs and disbursements in this action.

Respectfully submitted,
CLARENCE D. PHILLIPS
Of Attorneys for Plaintiff.

Filed April 8, 1938
G. H. Marsh, Clerk
By F. L. Buck, Chief Deputy. [69]

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

To the Honorable Claude McCulloch, Judge of the above-entitled Court:

Comes now the above-named defendant by Carl C. Donaugh, United States Attorney, for the District of Oregon, and M. B. Strayer, Assistant United States Attorney, and Thomas R. Winter, General Counsel Representative for the Bureau of Internal Revenue, his attorneys, and, based upon the evidence adduced, requests and moves the Court to make and adopt as its own, the following:

FINDINGS OF FACT

I.

That at all times herein mentioned, the above-named plaintiff was a corporation organized and

existing under and by virtue of the laws of the State of Oregon, having its principal place of business in Portland, County of Multnomah, Oregon, and that the said corporation was voluntarily dissolved by resolution as of December 24, 1935, and since that date, and at the present time, is engaged in the process of liquidation, the collection of its debts and distribution of assets to its stockholders.

II.

That since the 17th day of July, 1933, the above-named defendant was, and now is, the duly appointed, qualified and Acting Collector of Internal Revenue for the District of Oregon, having his office in the City of Portland, County of Multnomah, Oregon.

III.

That on the 6th day of April, 1931, plaintiff corporation was organized under the laws of the State of Oregon, with an authorized capital stock [71] of 350,000 shares having a par value of $1.00 per share and that on May 1, 1931, C. R. Griffith and others subscribed for all of the stock of said corporation and paid for the same by assigning and transferring to the plaintiff corporation on May 1, 1931, an oil and gas lease on eighty acres of land in Big Horn County, State of Wyoming; that as a part of said subscription, it was agreed that if the subscription was accepted by the plaintiff corporation, that the said C. R. Griffith would donate back to the plaintiff corporation 249,996 shares of

said capital stock for the use and benefit of the plaintiff corporation and he directed that the balance of 60,000 shares be issued in Casing-Head Gas & Oil Company, 15,000 shares to M. F. Swift, and 25,000 shares to himself, C. R. Griffith; that the subscription of C. R. Griffith for 349,996 shares was accepted by plaintiff corporation and notwithstanding the provisions of the subscription stock, Certificate No. 1 for 349,996 shares was issued May 1, 1931, in the name of C. R. Griffith, which stock certificate was assigned and transferred by C. R. Griffith to Franklin T. Griffith, et al, trustees; that subsequently said certificate was surrendered to the plaintiff corporation for cancellation and transfer and Certificate No. 6, dated September 22, 1931, was issued by plaintiff corporation transferring 349,995 of such shares to Franklin T. Griffith, et al, trustees; that Franklin T. Griffith, et al, were the voting trustees under a voting trust agreement dated as of May 1, 1931, by and between all of the stockholders of the plaintiff corporation and Franklin T. Griffith, et al, trustees.

IV.

That on October 1, 1931, the plaintiff corporation's Articles of Incorporation were amended, changing and increasing its shares of capital stock from 350,000 shares of $1.00 par value each to 750,000 shares without par or face value and issued one share of no par shares for each of the $1.00 par value shares then outstanding.

V.

That subsequent to the increase and change of said capital stock, various persons subscribed for additional 155,000 of the new no par value shares, all of which were issued on April 5, 1932, to Franklin T. Griffith, et al, trustees, as shown by the one stock Certificate No. 7 for 505,000 shares which [72] includes 349,995 shares transferred to the trustees shown by stock Certificate No. 6, dated September 22, 1931, and which stock certificate was surrendered to plaintiff corporation for cancellation.

VI.

That one of the items claimed by the plaintiff in its complaint as an erroneous assessment and collection of tax is the tax of 2c per share on the transfer of the rights of various persons (subscribers for such shares) to receive 155,000 shares of stock, which shares of stock were represented by Certificate No. 7 for 505,000 shares issued to the trustees, the same being Item No. 5 of the Commissioner of Internal Revenue notice of adjustment of claim for refund which was rejected in the amount of $3,100.00.

VII.

That one of the items claimed by the plaintiff in its complaint as an erroneous assessment and collection of tax is the tax of 2c for $100.00 or fraction thereof of the par or face value of 249,996 shares of the stock donated by C. R. Griffith to the

plaintiff corporation, the same being Item No. 8 of the Commissioner of Internal Revenue notice of adjustment of claim for refund which was rejected in the amount of $50.00.

VIII.

That two of the items claimed by the plaintiff corporation in its complaint as erroneous assessments and collections of tax is 2c per share on the transfer on the part of the plaintiff corporation of its right to receive voting trust certificates representing 7,000 and 3,000 shares of treasury stock deposited by the plaintiff corporation with the trustees, the same being Items 12 and 13 of the Commissioner of Internal Revenue notice of adjustment of claim for refund which was rejected in the amount of $140.00 and $60.00 respectively.

IX.

That one of the items claimed by the plaintiff corporation in its complaint as an erroneous assessment and collection of tax is 2c per $100.00 or fraction thereof of the par value of the shares and 2c per share of the no par shares on the transfer on the part of the depositors of said stock of their rights to receive voting trust certificates representing shares of plaintiff corporation [73] stock as shown by voting trust certificates No. 1 to No. 150, inclusive, and No. 151 to No. 390, inclusive, save and except the tax on the transfers conceded by the plaintiff in its complaint and exhibit attached

thereto. This is Item No. 14 of the Commissioner of Internal Revenue notice of adjustment of claim for refund which was rejected in the amount of $2,408.91.

X.

That one of the items claimed by the plaintiff corporation in its complaint as an erroneous assessment and collection of tax is 4c per share, no par value shares, on the transfer and the transfer on the part of depositors of said stock with the trustees of their rights to receive voting trust certificates No. 409 to No. 417, inclusive, less $140.00 tax on Certificate No. 410, conceded by plaintiff and $106.00 paid by stamps purchased and affixed by plaintiff. This is Item No. 15 of the Commissioner of Internal Revenue notice of adjustment of claim for refund, which was rejected in the amount of $65.60.

XI.

That in October, 1933, the Commissioner of Internal Revenue assessed documentary stamp taxes in the sum of $9,772.29 and in November, 1935, assessed a penalty thereon of five per cent thereof in the amount of $488.61 and interest in the amount of $1,942.73.

XII.

That in November, 1933, the Commissioner of Internal Revenue assessed against the plaintiff documentary stamp tax in the amount of $205.60 and in November, 1935, the Commissioner of Internal

Revenue assessed a penalty of five per cent in the sum of $10.28, together with interest thereon in the sum of $2.60 and additional interest on stamp taxes previously assessed in the amount of $41.29.

XIII.

That thereafter, the defendant caused notice of tax lien on account of said assessments to be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone County, Montana, the plaintiff having property situated in said counties in Wyoming and Montana. [74]

XIV.

That on or about November 4, 1935, plaintiff paid to this defendant under protest the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes and that thereafter the defendant caused the liens hereinbefore referred to be satisfied and discharged of record; that on March 5, 1935, the plaintiff paid to the defendant as Collector of Internal Revenue, under protest, the sum of $1,989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue; that on November 15, 1935, the plaintiff filed with the defendant as Collector of Internal Revenue, claim for refund for documentary stamp taxes, penalty and interest, previously paid in the sum of $10,298.18; that of the said amount claimed to be refundable, the sum of $8,124.51 represented stamp taxes previously as-

sessed and paid, and $2,173.67 thereof represented penalties and interest previously assessed and paid on said stamp taxes.

XV.

That on or about the 18th day of February, 1937, the Commissioner of Internal Revenue authorized and paid a refund upon said claim in the amount of $2,950.90 and rejected plaintiff's claim for refund in the sum of $7,347.28; that of the said sum of $2,950.90, which the Commissioner allowed and authorized to be refunded and paid to the plaintiff, $2,300.00 represented a refund of documentary stamp taxes previously assessed by the Commissioner and paid by the plaintiff and $650.90 represented a refund of penalties and interest previously assessed by the Commissioner and paid by the said plaintiff.

XVI.

That on or about February 18, 1937, the Commissioner of Internal Revenue notified the plaintiff by letter that said claim for refund had been rejected in the amount of $7,347.28.

XVII.

That no part of said $7,347.28 has been refunded to the plaintiff or anyone else. [75]

XVIII.

That the Board of Directors of the plaintiff corporation in a meeting held Jan. 27, 1932, granted options to Paul Stock, E. W. Battleson and Frank-

lin T. Griffith, to purchase 35,000 shares of plaintiff corporation capital stock as shown by the following resolutions:

"Be It Further Resolved that in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company as shown by the audit of the books of said company of December 31, 1931, to-wit:

Paul Stock	$3,929.45
E. J. Fleming	3,500.00
J. G. Everett, representing the claim of Associated Independent Dealers	1,331.72
J. G. Everett	1,000.00

this corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932."

"Resolved that in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share."

"Resolved that in consideration of his lending this corporation the sum of $10,000, Mr. Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior

to July 31, 1932, at the price of $1.00 per share."

XIX

That early in the year 1935, Mr. Paul Stock assigned and delivered to plaintiff corporation voting trust certificates representing 35,000 shares no par value of the plaintiff corporation's capital stock in exchange for an oil and gas lease which lease was originally assigned and transferred to the plaintiff corporation by Mr. Paul Stock on February 1, 1932, in payment for 35,000 shares of stock in plaintiff corporation.

XX

That the items claimed by the plaintiff in its supplemental complaint as erroneous assessments and collections of tax represent tax at 4¢ per share of $1,400.00 on the forestated options or agreements to sell 35,000 shares of stock by plaintiff corporation, and the transfer by Paul Stock to plaintiff corporation of voting trust certificates representing 35,000 shares of the [76] capital stock of plaintiff corporation at 4¢ per share amounting to $1,400.00.

XXI

That on or about January 11, 1936, the Commissioner of Internal Revenue assessed against the plaintiff documentary stamp taxes in the sum of $2,800.00, which, together with interest thereon of $175.81, was paid to the defendant as Collector of Internal Revenue on February 17, 1937.

XXII.

That on February 18, 1937, the plaintiff filed with the defendant as Collector of Internal Revenue a claim for refund of documentary stamp taxes and interest previously paid in the sum of $2,975.81.

XXIII.

That thereafter, and on or about the 18th day of September, 1937, the Commissioner of Internal Revenue rejected plaintiff's claim for refund in the total amount of $2,975.81.

XXIV.

That no part of said $2,975.81 has been refunded to the plaintiff or anyone else.

CONCLUSIONS OF LAW

I.

That the tax assessed and collected in the sum of $3,100.00 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926.

II.

That the tax assessed and collected in the sum of $50.00 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926.

III.

That the tax assessed and collected in the sum of $140.00 was legally assessed and collected and

in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926.

IV.

That the tax assessed and collected in the sum of $60.00 was legally [77] assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926.

V.

That the tax assessed and collected in the sum of $2,408.91 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

VI.

That the tax assessed and collected in the sum of $65.60 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

VII.

That the tax assessed and collected in the sum of $1,400.00 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

VIII.

That the tax assessed and collected in the sum of $1,400.00 was legally assessed and collected and in strict accordance with Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

IX.

That the defendant's motion for judgment must be sustained.

X.

That judgment must be entered in favor of the defendant and for his costs of suit herein.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney.

M. B. STRAYER,
Ass't United States Attorney.

THOMAS R. WINTER,
General Counsel Representative.

Filed June 6, 1938. G. H. Marsh, Clerk. By E. W. Knowles, Deputy. [78]

[Title of District Court and Cause.]

MEMORANDUM OPINION

In disposing of this case, I will follow the headings as set out in defendant's brief, beginning at page 2:

"I

"Was there a tax of two cents per share on the transfer of the rights of various persons (subscribers for such shares) to receive 155,000 shares of stock within the meaning of Schedule A-3, Title VIII of the Revenue Act of 1926: Total tax—$3100.00."

In the Raybestos, Founders and other cases, there was an existing right to receive the stock, which was transferred either upon a consideration or by direction of the one owning the right. Such is not the present case. It, rather, is the creation of a trust. There was no transfer of a right to receive stock, because no such right was in existence. Compare the late case of Corporation of America v. John P. McLaughlin, United States Collector.............., 9th Cir., decided November 22, 1938. Recovery is allowed.

"II

> "Was there a tax of two cents for $100.00 or fraction thereof of the par or face value of 249,996 shares of stock donated by C. R. Griffith to the plaintiff corporation within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926—total tax, $50.00."

What appears to have happened here is that the stockholder did not carry out the original plan of donation to the treasury of the corporation, but rather transferred the stock directly to the voting trustees. The basis of the tax is the erroneous assumption that the stock was actually donated [80] to the corporation (see testimony of Mr. Canneddy, p. 64 of Transcript). Since the corporation had the technical right to require that the mechanics provided in the original stock subscription be carried out, to-wit: donation to the treasury of the shares in question, then transfer by the corporation

to the voting trustees, rather than transfer direct by the subscriber to the voting trustees, as was done, I feel that the doctrine of the leading Supreme Court cases cited above justifies the tax. I note that refund was not claimed on the Casing Head and the Swift stock, where the same question was involved. Recovery denied.

"III

"Was there a tax of two cents per share on the transfer on the part of the plaintiff corporation of its RIGHT TO RECEIVE VOTING TRUST CERTIFICATES representing 7,000 shares of treasury stock deposited by the plaintiff corporation with the trustee within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926, total tax, $140.00.

IV.

"Was there a tax of two cents per share on the transfer on the part of the plaintiff corporation of its RIGHT TO RECEIVE VOTING TRUST CERTIFICATES representing 3,000 shares of treasury stock deposited by the plaintiff corporation with the trustee within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926—total tax, $60.00.

V.

"Was there a tax of two cents per $100.00 or fraction thereof of the par value of the

shares and two cents per share of the no par value on the transfer on the part of the depositors of said stock of their RIGHTS TO RECEIVE VOTING TRUST CERTIFICATES representing shares of plaintiff corporation stock save and except the tax on the transfers conceded by plaintiff corporation in its complaint and exhibit attached thereto within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926—total tax, $2,408.91.

VI.

"Was there a tax of four cents per share, no par value shares, on the transfer and the transfer on the part of depositors of said stock with the trustees of their RIGHT TO RECEIVE VOTING TRUST CERTICATES No. 409 to 417, inclusive, less $140.00 tax on certificate No. 410, conceded by plaintiff corporation and $106.00 paid by stamps purchased and affixed by plaintiff within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926 as amended by Section 722 (a) of the Revenue Act of 1932—total tax, $65.60." [81]

Paragraphs III, IV, V and VI above all raise the same question—whether the transfer of "the right to receive voting trust certificates" is taxable. As pointed out in the comment following paragraph VIII below, the transfer of voting trust certificates is taxable, because the trust certificates carry

the right to receive the stock at the end of the trust agreement, but I do not find either in the law or the regulations any authority for taxing a transfer of a "right to receive voting trust certificates." Compare the discussions re transfer of equitable rights in Corporation of America v. John P. McLaughlin, supra. Recovery allowed.

"VII

> "Did the options embodied in the resolution of the Board of Directors of the plaintiff corporation on January 27, 1932, constitute agreements to sell stock within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926—total tax, $1,400.00."

An option is a continuing offer and does not become an agreement to sell until the offer is accepted by exercise of the option. Options are of such general use and their meaning so well understood, Congress would, in my judgment, have used the word "options" in the taxing statutes, had it intended them to be taxable. The provisions of a taxing statute are not to be extended by implication beyond the clear import of the language used, and ambiguities are to be resolved in favor of the taxpayer. White v. Aronson, 302 U. S. 16, 20; Corporation of America v. John P. McLaughlin, supra. Recovery allowed.

"VIII

"Was there a tax of four cents per share on the transfer during 1935 by Paul Stock to plaintiff corporation of voting trust certificates representing 35,000 shares of the capital stock of plaintiff corporation within the meaning of Section 800, Schedule A-3, Title VIII, of the Revenue Act of 1926 as amended—total tax, $1,400."

As stated under III, IV, V and VI above, the transfer of voting trust certificates seems to me to be taxable, because with the certificates goes the right to receive the stock at the end of the trust. Thus a transfer [82] of the right to receive stock is involved. See also language in Corporation of America v. John P. McLaughlin, indicating that a transfer of voting trust certificates is a transfer of the right to receive profits. However, I find nothing in the record supporting defendant's claim that Paul Stock transferred voting trust certificates representing 35,000 shares of stock to the plaintiff corporation. Perhaps defendant's attorneys can point out the place in the record where this appears.

Dated at Portland, Oregon, November 29, 1938.

CLAUDE McCOLLOCH.

Filed November 29, 1938. G. H. Marsh, Clerk. By R. DeMott, Deputy. [83]

[Title of District Court and Cause.]

SUPPLEMENTAL OPINION

"VIII.

"Was there a tax of four cents per share on the transfer during 1935 by Paul Stock to plaintiff corporation of voting trust certificates representing 35,000 shares of the capital stock of plaintiff corporation within the meaning of Section 800, Schedule A-3, Title VIII, of The Revenue Act of 1926 as amended—total tax, $1,400."

Following the earlier Memorandum Opinion, the Government has made a further showing in opposition to recovery under the above heading, and on that showing I hold with the Government.

Will the attorneys for the plaintiff please prepare Findings, Conclusions and form of Judgment in accordance with said earlier Opinion and with this Opinion, with service on the defendant's attorneys.

Dated at Portland, Oregon, December 30th, 1938.

CLAUDE McCOLLOCH

Judge

Filed December 30, 1938.

G. H. Marsh, Clerk.

By R. DeMott, Deputy. [85]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial in the above entitled Court before the Honorable Claude McColloch, without a jury, on Thursday, March 31, 1938; the plaintiffs appeared by their attorneys Griffiths, Peck & Coke, and the defendant appeared by his attorneys, Carl C. Donough, United States District Attorney and M. B. Strayer, Assistant United States Attorney, and Thomas R. Winter, special attorney, Bureau of Internal Revenue, and the Court having heard the evidence herein and the respective parties having submitted briefs in the above cause and the Court now being fully advised in the premises, makes the folowing:

FINDINGS OF FACT

I.

That at all times herein mentioned the above named plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and that said corporation was voluntarily dissolved by resolution as of December 24, 1935, and since said date, and at the present time, is engaged in the process of liquidation, the collection of its debts and distribution of assets to its stockholders. [87]

II.

That at all times herein mentioned, the above defendant was and now is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Oregon having his office in the City of Portland, Multnomah County, Oregon.

III.

That on or about October of 1933, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the above plaintiff in the sum of $9,772.29, together with a penalty of 5 per centum in the amount of $488.61, together with interest thereon in the sum of $123.42, making a total assessment of $10,384.32, and thereafter on or about the 11th day of December, 1933, the above defendant gave notice of said assessment to the above plaintiff.

IV.

That on or about November, 1933, the Commissioner of Internal Revenue made an assessment against the above plaintiff on account of documentary stamp taxes in the sum of $205.60 together with a penalty of 5 per centum in the sum of $10.28, together with interest thereon in the sum of $2.60, making a total assessment of $218.48, together with an additional amount of interest in the sum of $41.29, making a total assessment of $259.77, and that the said defendant thereafter on or about the 11th day of December, 1933, gave notice of said assessment to the above plaintiff. [88]

V.

That thereafter the above defendant caused notice of tax lien, on account of said assessment, to be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone County, Montana, the above plaintiff having property situated in said counties in Wyoming and Montana.

VI.

That on March 5, 1935, the plaintiff paid to the above defendant under protest the sum of $1989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue; that on or about November 2, 1935, the plaintiff paid to the above defendant under protest the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes, and that thereafter the above defendant caused the said liens hereinbefore referred to to be satisfied and discharged of record.

VII.

That on November 15, 1935, the plaintiff filed with the defendant, as Collector of Internal Revenue, a claim for refund of documentary stamp taxes, penalties and interest previously paid in the sum of $10,298.18; that of the said amount claimed to be refundable the sum of $8,124.51 represented stamp taxes previously assessed and paid, and $2,173.67 thereof represented penalties and interest previously assessed and paid on said stamp taxes.

VIII.

That thereafter, and on or about the 18th day [89] of February, 1937, the Commissioner of Internal Revenue of the United States authorized a refund upon said claim for refund in the amount of $2,950.90, and rejected plaintiff's claim for refund in the sum of $7,347.28; that thereafter, and on or about the 2nd day of March, 1937, the above defendant, in accordance with said ruling of the Commissioner upon said claim for refund, paid to the above plaintiff, as a refund, the sum of $2,950.90, which represented a refund of documentary stamp taxes previously assessed by the Commissioner in the sum of $2300.00, which was paid by the plaintiff, and $650.90 represented the refund of penalties and interest previously assessed by the Commissioner and paid by the plaintiff.

IX.

That prior to filing complaint herein more than six months elapsed since the date of the filing of said claim for refund, and that the Commissioner of Internal Revenue, on or about February 18, 1937, notified the above plaintiff by letter that said claim for refund had been rejected in the amount of $7,347.28.

X.

That on or about January 11, 1936, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the

above plaintiff in the sum of $2800.00, and thereafter, and on or about January 22, 1936, the above defendant made demand upon the above plaintiff for the payment of said tax, together with penalties and interest thereon and thereafter and on or about the 8th day of February subsequent notice and demand was given by said defendant [90] to the above plaintiff and pursuant thereto and on February 16, 1937, the above plaintiff paid to the above defendant, under protest, the sum of $2800.00, together with penalty and interest thereon in the sum of $175.81 or a total payment of $2,975.81 on account of said documentary stamp taxes.

XI.

That thereafter and on or about February 17, 1937, the above plaintiff filed with the above defendant its claim for refund in the sum of $2,975.81, including $2800.00 documentary stamp taxes and $175.81 interest and penalties and claimed a refund in the total amount of $2,975.81.

XII.

That thereafter and on or about the 18th day of September, 1937, the Commissioner of Internal Revenue of the United States, rejected plaintiff's claim for refund in the total amount of $2,975.81.

XIII.

That prior to filing complaint herein more than six months elapsed since the date of the filing of

said claim for refund and that the said claim for refund has now been rejected in the total amount.

XIV.

That on April 6, 1931, plaintiff corporation was organized under the laws of the State of Oregon, with an authorized capital stock of 350,000 shares, having a par value of $1.00 per share; that on May 1, 1931 subscriptions were made to said capital stock as shown by the minute records of said corporation, in words [91] and figures as follows:

> "C. R. Griffith does hereby subscribe for 349,996 shares of the par value of $1.00 per share aggregating $349,996.00 of Portland Associates, Inc., an Oregon corporation, and agrees to pay for the same by transferring and assigning to the corporation that certain indenture of lease entered into under day of March 13th, 1931, by and between Montana and Wyoming Oil Company as lessor and C. R. Griffith trustee, as lessee, covering the following described real property in the county of Big Horn and State of Wyoming:
>
> The southwest (SW) quarter of the southeast (SE) quarter and the southeast (SE) quarter of the southwest (SW) quarter of section 28 in township 56 north of range 97 west of the sixth principal meridian, containing 80 acres more or less.

and by transferring and delivering to the corporation that certain drilling contract dated April 16th, 1931 and secured by said trustee and his associates for this corporation from Paul Stock of Cody, Wyoming as driller.

"The undersigned agrees that if this conditional subscription is accepted that he will donate 249,996 shares of said capital stock to the corporation for sale by it upon such terms and conditions as it may desire to sell the same or for use by it in any manner it desires, subject however to a voting trust agreement to be executed prior to the time said stock is delivered to this corporation. In the event this conditional subscription is accepted the undersigned directs that 60,000 shares of said stock be issued to Casing-Head Gas & Oil Co., that 15,000 shares of said stock be issued to M. F. Swift, that 25,000 shares of said stock be issued to C. R. Griffith, and that the remaining 249,996 shares be issued to the Secretary of Portland Associates, Inc. in trust for said corporation and such distribution as may from time to time be determined upon by the directors of said Portland Associates, Inc.

C. R. GRIFFITH

"We, the undersigi ed, do hereby subscribe for the number of shares of capital stock of Portland Associates, Inc. set after our names

and agree to pay therefor at the rate of $1.00 per share upon call of said subscription.

Name	Number of Shares
Franklin T. Griffith	One
N. F. Swift	One
E. W. Battleson	One
S. M. Mears	One [92]

XV.

That the stockholders of said corporation accepted the offer of C. R. Griffith at a meeting of stockholders held May 1, 1931, and the directors of said corporation accepted said offer at a directors' meeting held May 1, 1931.

XVI.

That certificate of stock No. 1 was issued to C. R. Griffith for 349,996 shares, and that certificates Nos. 2, 3, 4 and 5 were issued to Franklin T. Griffith, S. M. Mears, E. W. Battleson and M. F. Swift for one share each, and that a documentary stamp tax was paid on the issuance of said certificates in the amount of $175.20; thereafter certificate No. 1 was endorsed and transferred by C. R. Griffith to Franklin T. Griffith, C. R. Griffith and E. M. Steell, Trustees, transferring to said Trustees 349,995 shares, and certificate No. 6 for said number of shares was issued to said Trustees and a transfer tax in the amount of $70.00 was paid thereon; that certificate No. 8 was a void certificate used as a

specimen only; that certificate No. 9 was issued to Paul Stock for one share and certificate No. 10 was issued to H. K. Senor for one share, being transfers from the Trustees and a documentary stamp tax paid on such transfers in the sum of 4 cents.

XVII.

That a stamp tax was paid in the amount of $3.00 on the authorization of C. R. Griffith to transfer 15,000 shares to M. F. Swift, and that a documentary [93] stamp tax of $12.00 was assessed and paid on the authorization to transfer 60,000 shares to Casing-Head Gas & Oil Company.

XVIII.

That there was no transfer of stock from C. R. Griffith to Portland Associates, Inc. or to the treasury of said corporation, or to any one as an officer of said corporation.

XIX.

That on October 1, 1931 the Articles of Incorporation of the plaintiff were amended, changing and increasing the authorized capital stock of said corporation from 350,000 shares of the par value of $1.00 each, to 750,000 shares without par value, and there were issued one share of no par value for each share of $1.00 par value stock then outstanding.

XX.

That there was issued to Franklin T. Griffith, C. R. Griffith and E. M. Steell, as Trustees, certificate

No. 7 representing 505,000 shares of the capital stock, which included 349,995 shares transferred to the Trustees above named by stock certificate No. 6 dated September 22, 1931, and the additional 155,005 shares were issued in addition thereto under authorization of the directors and stockholders of the corporation.

XXI.

That an original issue documentary stamp tax was paid upon said 155,000 shares in the sum of $77.50; that there was no transfer to the Trustees as shown by the records of said corporation other than the issuance [94] of said certificate above mentioned.

XXII.

That the original subscription of C. R. Griffith for 349,996 shares of the capital stock of said corporation was conditioned upon the creation of a voting trust, and a voting trust agreement was made and entered into as of May 1, 1933 between all of the stockholders of Portland Associates, Inc. and Franklin T. Griffith, C. R. Griffith and E. M. Steell as voting trustees, and that all of the stock of said corporation (except directors' qualifying shares) was held under the terms of said voting trust agreement, and that the Title and Trust Company, Portland, Oregon, acted as depositary under said agreement, and acted as agent of the voting trustees; that the voting trustees sold voting trust certificates to various individuals and received the money therefor and paid the same into the treasury

of the corporation, and the voting trustees caused to be issued to the purchasers of said certificates voting trust certificates; that the above plaintiff, Portland Associates Inc., was not a party to said voting trust agreement, and the above plaintiff corporation, did not issue or cause to be issued any of the voting trust certificates, and that said voting trust agreement was made for the benefit of the stockholders of said corporation, and that said voting trust agreement expressly provided that the entire outstanding capital stock of Portland Associates, except directors' qualifying shares, has been acquired and transferred to the Trustees upon the express understanding and agreement that all of said shares of [95] stock will be assigned and delivered to the Trustees, the said Trustees to hold and exercise the rights appertaining thereto under the terms of said agreement.

XXIII.

That no stock certificates have been issued by the above plaintiff corporation except stock certificates to the said voting trustees and directors' qualifying shares of one share each to each of the directors of said corporation; except as herein otherwise specifically found and declared no person had any right to receive shares of stock in the above plaintiff corporation or certificates representing shares of stock issued by the above plaintiff corporation except said voting trustees and the directors qualifying, one share each.

XXIV.

That among other things there was assessed, levied against and collected from the above plaintiff a documentary stamp tax in the sum of $3100.00 as a transfer tax upon 155,000 shares of stock; that the records of said corporation do not show any transfer of 155,000 shares of the capital stock upon which such tax can be assessed, levied or collected.

XXV.

That among other things there was assessed, levied against and collected from the above plaintiff the sum of $50.00 documentary stamp tax on a transfer of stock from C. R. Griffith to the treasury of said corporation; that the records of said corporation do not show any transfer upon which such tax can be assessed, levied or collected, but since the corporation had the [96] technical right to require that the mechanics provided in the original stock subscription be carried out, to-wit: Donation to the treasury of the shares in question, then transfer by the Corporation to the Voting Trustees, rather than transfer direct by the subscriber to the voting trustees, justifies the tax, and the tax was therefore legally assessed, levied and collected in the amount of Fifty ($50.00) Dollars upon such transfer.

XXVI.

That among other things there was assessed, levied against and collected from the above plaintiff a documentary stamp tax in the sum of $140.00

on purported transfers as of June 20, 1932; that the records of said corporation do not disclose any transfer of capital stock as of June 20, 1932 upon which said tax could be levied, assessed or collected.

XXVII.

That among other things there has been assessed and levied against and collected from said plaintiff corporation the sum of $120.00 upon a purported transfer subsequent to June 21, 1932, and that a refund has been made thereon in the sum of $60.00, leaving an assessment and collection on account thereof in the sum of $60.00; that the records of said corporation do not disclose any such transfer of capital stock upon which a documentary stamp tax could be assessed, levied or collected.

XXVIII.

That there has been assessed, levied against and collected from said corporation documentary stamp taxes on purported transfers of voting trust certificates including a transfer tax on all of the voting trust [97] certificates and that there was no transfer of certificates or of the right to receive by the above plaintiff corporation upon said voting trust certificates listed in the voting trust certificate books as original issues upon which a tax could be assessed, levied or collected, and that said voting trust certificates are as follows:

1 to 38, inclusive, 41, 42, 46 to 52, inclusive, 54 to 66, inclusive, 68 to 118, inclusive, 127, 129, 157, 158, 204 to 208, inclusive, 222, 223, 233 to

236, inclusive, 244 to 247, inclusive, 276 to 284, inclusive, 290, 294 to 334, inclusive, 339 to 342, inclusive, 359, 360, 361, 374, 411 to 416, inclusive.

XXIX.

That documentary stamp tax on transfer was assessed and levied against and collected from the above corporation on certain voting trust certificates; that the records of said corporation show that there was no transfer of said certificates, which are numbered as follows:

228, 409 and 417.

XXX.

That the minute records of the plaintiff corporation show that at an adjourned meeting of the Board of Directors held January 27, 1932, resolutions were adopted as follows:

RESOLVED that this corporation purchase all of the capital stock of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, in accordance with the proposition which has been submitted to this corporation by Mr. Paul Stock, representing the owners of all of the issued and outstanding stock of said Big Horn Oil & Refining Company, and in payment therefor issue 95,000 shares of the capital stock of this corporation as follows:

To	Jeff Tingle	2,000 shares
	E. J. Fleming	10,000 shares
	Mrs. E. E. Fleming	2,000 shares
	T. R. Graham	1,000 shares

[98]

J. E. Simon	500 shares
R. J. O'Malley	2,000 shares
J. G. Everett	19,000 shares
G. H. Downs	1,000 shares
Paul Stock	57,500 shares

BE IT FURTHER RESOLVED that in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company as shown by the audit of the books of said company of December 31, 1931, to-wit:

Paul Stock	$3,929.45
E. J. Fleming	3,500.00
J. G. Everett, representing the claim of Associated Independent Dealers	1,331.72
J. G. Everett	1,000.00

this corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932."

"RESOLVED that in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the

> capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share."
>
> "RESOLVED that in consideration of his lending this corporation the sum of $10,000, Mr. Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share."

that no option agreements were made in writing between the corporation and the respective parties mentioned in said resolution; that no money was ever paid by any of the persons mentioned in said resolutions for the purchase of any stock as mentioned in said purported options, and that no stock was ever issued by the above plaintiff corporation to any of said persons on account of said purported options, and that none of said persons ever received any such stock and did not have the right to [99] receive such stock unless and until they should pay the money therefor; that there was no issuance or transfer of any stock in said corporation to any of said persons which was subject to documentary stamp tax either for issuance or transfer on account of the recitations in said minutes. The defendant has admitted by stipulation in Court that the plaintiff is entitled to at least the sum of Seven Hundred ($700.00) Dollars on this item and the court finds that the plaintiff is entitled to a total amount of Fourteen Hundred ($1400.00) Dollars.

XXXI.

That there is competent evidence to show that voting trust certificates representing 35,000 shares of capital stock of the plaintiff corporation was assigned, transferred and delivered by Paul Stock to the Corporation and that the transfer thereof was taxable in the amount of $1400.00.

CONCLUSIONS OF LAW

I.

That the tax assessed and collected in the sum of $3100.00 on 155,000 shares was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to a refund thereof, together with interest and penalties levied and collected in addition thereto.

II.

That the tax assessed and collected in the sum of $50.00 on 249,996 shares of stock was lawfully assessed and collected and that the plaintiff is not [100] entitled to recover the said $50.00, or any interest or penalties collected in addition thereto.

III.

That the tax assessed and collected in the sum of $140.00 on 7000 shares was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said $140.00, together with interest and penalties assessed and collected in addition thereto.

IV.

That the tax assessed and collected in the sum of $60.00 on 3000 shares was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said $60.00, together with any penalties and interest assessed and collected in addition thereto.

V.

That the tax assessed and collected in the sum of $2,408.91 on original issues of voting trust certificates was assessed and collected unlawfully and erroneously, and that the plaintiff is entitled to recover said sum, together with any and all penalties and interest assessed and collected in addition thereto.

VI.

That the tax assessed and collected in the sum of $65.60 on voting trust certificates was unlawfully and erroneously assessed and collected, and that the plaintiff is entitled to recover the said sum of $65.60 together with any and all penalties and interest assessed and collected in addition thereto. [101]

VII.

That the resolutions of the Board of Directors adopted January 27, 1932, referring to certain options, do not constitute taxable transfers under Schedule A-3 of Title VIII of the Revenue Act of 1926, and that the tax assessed and collected in the sum of $1400.00 thereon was unlawfully and erro-

neously assessed and collected, and that the plaintiff is entitled to recover said $1400.00, together with any and all penalties and interest assessed and collected in addition thereto.

VIII.

That the tax assessed and collected in the sum of $1400.00 on transfer of voting trust certificates by Paul Stock was lawfully assessed and collected, and that the plaintiff is not entitled to recover said sum of $1400.00 or any penalties or interest assessed and collected in addition thereto.

IX.

That plaintiff is entitled to a judgment against the above defendant upon its original complaint in the sum of $7,282.48, together with interest thereon at the rate of 6 per cent. per annum from November 2, 1935, and upon its supplemental complaint for a judgment against the defendant in the sum of $1487.90, together with interest thereon at the rate of 6 per cent. per annum from February 16, 1937, together with plaintiff's costs and disbursements in this action.

Dated at Portland, Oregon, this 7th day of January, 1939.

CLAUDE McCOLLOCH
Judge

Filed January 7, 1939.
G. H. Marsh, Clerk.
By R. DeMott, Deputy. [102]

In the District Court of the United States
for the District of Oregon

No. L-12934

PORTLAND ASSOCIATES, INC., a corporation,
Plaintiff,

vs.

J. W. MALONEY, Collector of Internal Revenue,
Portland, Oregon,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial in the above entitled Court, the Honorable Claude McColloch, Judge, presiding, on Thursday, March 31, 1938, and the parties agreeing that the cause may be tried without a Jury, the plaintiff appearing by its attorneys, Griffith, Peck & Coke and Clarence D. Phillips, and the defendant appearing by his attorneys, Carl C. Donough, United States District Attorney and M. B. Strayer, assistant United States Attorney and Thomas R. Winter, special attorney, Bureau of Internal Revenue, and the Court having heard the evidence submitted and the parties hereto having filed briefs herein, and the plaintiff having moved for judgment in its favor herein, and the Court having taken the cause under consideration, and the Court having heretofore made and entered its findings of fact and conclusions of law herein, and the Court having examined the rec-

ords and files herein and now being fully advised in the premises, and based upon said findings of fact and conclusions of law, [104]

It is therefore considered, ordered and adjudged that the above entitled plaintiff have and recover of and from the above defendant the sum of Seven Thousand Two Hundred Eighty-two and 48/100 ($7,282.48) Dollars, together with interest thereon at the rate of 6% per annum from November 2, 1935, on the cause of action set forth in plaintiff's original complaint and that the plaintiff have and recover of and from the above defendant the further sum of One Thousand Four Hundred and Seven and 90/100 ($1,407.90) Dollars, together with interest thereon at the rate of 6% per annum from February 16, 1937, upon the cause of action set forth in plaintiff's supplemental complaint, together with plaintiff's costs and disbursements herein taxed at $31.06.

Dated at Portland, Oregon, this 7th day of January, 1939.

CLAUDE McCOLLOCH

Judge

Filed January 7, 1939.

G. H. Marsh, Clerk.

By R. DeMott, Deputy. [105]

[Title of District Court and Cause.]

CERTIFICATE

I, Claude McColloch, being a Judge of the United States District Court for the District of Oregon, do hereby certify that I presided at the trial of the action of Portland Associates, Inc. vs. J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, wherein the plaintiff sought to recover a sum of money theretofore paid under protest to the defendant as Collector of Internal Revenue for the District of Oregon, for documentary stamp taxes.

I further certify that it is my belief that the sums of money involved in said action, for which judgment was subsequently, on the 7th day of January, 1939, entered in favor of the plaintiff, were exacted from the plaintiff by the defendant, J. W. Maloney, Collector of Internal Revenue for the District of Oregon, in the performance of his official duty and there was, in my opinion, probable cause for the act done by said Collector of Internal Revenue and the same was done under the direction of the Secretary of the Treasury.

Dated at Portland, Oregon, this 25th day of January, 1939.

CLAUDE McCOLLOCH
District Judge

Filed January 25, 1939.
G. H. Marsh, Clerk.
By R. DeMott, Deputy. [107]

[Title of District Court and Cause.]

Be it remembered that the above entitled cause was heard before the Honorable Claude McColloch, Judge of the above entitled Court, without a jury, beginning Thursday, March 31, 1938, at 10:10 o'clock A. M.

Appearances:

Messrs. Griffith, Peck & Coke, by Mr. Clarence O. Phillips, attorneys for plaintiff.

Mr. Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, and Mr. M. B. Strayer, Assistant United States Attorney, attorneys for defendant.

After opening statements were made in behalf of the respective parties, evidence was given and proceedings were had as follows: [122]

Mr. Phillips: Call Mr. Griffith, please.

FRANKLIN T. GRIFFITH

was thereupon produced as a witness in behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Phillips:

Q. Your name is Franklin T. Griffith?

A. Yes.

Q. And what is your occupation?

A. I am a public utility executive and, by courtesy, I am head of the law firm of Griffith, Peck &

(Testimony of Franklin T. Griffith.)
Coke.

Q. You are admitted to practice law?

A. Yes.

Q. And how long have you been admitted in Oregon? A. Forty-four years.

Q. Now, were you one of the original subscribers to the Portland Associates, Inc., a corporation?

A. Yes, sir.

Q. I will hand you what purports to be the minute book of the corporation and ask you to examine that and tell the Court what it is.

A. This is the minute book of that corporation.

Mr. Winter: I think we can stipulate that that is the minute book of the Portland Associates, Inc.

Mr. Phillips: We will stipulate that, and it may be received [123] in evidence?

Mr. Winter: It may be received in evidence.

Mr. Phillips: And what about the stock books? That is, the stock books of the corporation, not the voting trust.

Mr. Winter: Yes. The same stipulation as to the stock books.

Mr. Phillips: We will offer the minute book and the two original stock books of the corporation in evidence.

(The minute book and two original stock books of Portland Associates, Inc., so offered were received in evidence and

(Testimony of Franklin T. Griffith.)

marked Plaintiff's Exhibits Nos. 1, 2, and 3, respectively.)

Mr. Phillips: And what about the voting trust agreement?

Mr. Winter: I haven't seen it before. I assume it is the same as the copy on that stipulation?

Mr. Phillips: Yes, it is the same.

Mr. Winter: No objection.

Mr. Phillips: We offer the voting trust agreement in evidence.

(The voting trust agreement of Portland Associates, Inc., so offered, was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Phillips: Q. Now, Mr. Griffith, who were the other organizers of this corporation?

A. M. F. Swift, who was associated with my brother in the preliminary negotiations for the acquisition of the lease; E. W. [124] Battleson, and S. M. Mears, as I recall it. The minutes will show that.

Q. Well, your brother, C. R. Griffith, subscribed for the bulk of the shares originally?

A. He subscribed for all except the directors' qualifying shares. The original incorporation was 350,000 shares of one dollar par, and my brother Charles subscribed for all but five shares of stock, which were subscribed by the other four associates.

(Testimony of Franklin T. Griffith.)

Q. And the two stock certificate books which are in evidence, do they show all issues and transfers of stock of the corporation?

A. There are no other books except those.

Mr. Winter: Now, if the Court please, that is a conclusion. The books speak for themselves.

Mr. Phillips: Q. Yes, but I mean are there any other stock books of this corporation any other place?

A. That is what I answered you. There are no other stock books.

Q. No other stock books. Now, the voting trust agreement is in evidence. Will you tell the Court what the purpose was in creating a voting trust agreement?

A. The purpose was simply the continuity of control and management in a highly hazardous venture. I didn't want to go into it. I think I was probably responsible for having that voting trust created, because I wanted to have some control over the venture. It was my brother's finding, and from the beginning I was expected to put up a considerable sum of money, which I did.

Q. What sort of a venture was this corporation going into? [125]

A. The production of oil and the refining of that oil.

Q. At the time of the formation of the corporation had they completed the well?

(Testimony of Franklin T. Griffith.)

A. No. At the time of the formation of the corporation the 80 acres were under lease to the Casing-Head Gas & Oil Company, a Montana corporation, and they had drilled a hole about seven hundred feet down. My brother was very much enamored of the enterprise; he thought there was a great field to be discovered there, and he wanted to get this lease. He did secure an option from the Casing-Head Company, paid them some money, spent quite a bit of time up there investigating it himself and also in employing some experts and geologists who gave him their opinion about it, so that when he made his deal finally he agreed that the Casing-Head Oil Company in consideration of the cancellation of their lease so that the owners of the land might make a direct lease to the Portland Associates, or rather to my brother at that time, that he would give them sixty thousand shares of this original issue of Portland Associates. Swift himself, having been a partner with my brother in working up the whole deal, was to be allocated 15,000 shares, and Charlie wanted to keep 25,000 shares himself. The estimated value of the property was sufficient to justify paying all of the stock for the leases. The remaining two hundred forty-nine thousand odd shares we agreed that he would turn back to the corporation in trust as treasury stock to be sold for the pur- [126] pose of carrying on the drilling of the well and the purchase of the

(Testimony of Franklin T. Griffith.)

refinery. Those shares were all transferred and the entire issue except the qualifying shares were transferred under the voting trust agreement and also the subscription to the stock which is in the minute book to the three voting trustees I have just described. They were originally C. R. Griffith, E. M. Steell, and myself. By death they were changed somewhat, so that in the final formation of the voting trust I think that the three voting trustees were Battleson, F. T. Griffith and Henry Waetchter. All of the stock, or interest in the stock of the corporation, was taken by the various men who were voting trustees as well as original incorporators, by purchasing directly from the voting trustees the quantity of stock that they had agreed upon. I purchased quite a lot of it myself, and received voting trust certificates for it. To my knowledge there have never been any shares of the capital stock itself issued except the voting trust that was created, other than the voting trustees; even since the expiration of the voting trust there has been no surrender of voting trust certificates and a demand for the original stock.

Q. You were not president of the Portland Associates, Inc., at the time of the formation of it?

A. My brother died in May, 1932, and thereafter I became president.

Q. Was he president? [127]

A. He had been president up to that time.

(Testimony of Franklin T. Griffith.)

Q. Yes, and up to the time of his death he was president? A. Yes.

Q. Since the time of his death you have been president of the corporation? A. Yes.

Q. Now, what mechanics were used in the sale of voting trust certificates after the creation of the voting trust?

A. The directors of the corporation from time to time specified the price at which the stock might be sold. When it was treasury stock or par value stock they had the right to do that in much the same manner they had afterwards when it became no par value stock. That was a mistake, of course, in converting the par value stock to no par value stock, because I suppose the directors weren't able to see quite far enough ahead to see what Congress was going to do in the matter of assessments on such stock. That is our idea. Otherwise there wouldn't be enough involved in this controversy to be worth while taking up the time of the Court. The principle of the thing would be exactly the same, but the amount wouldn't be sufficient to carry on all this turmoil.

Q. Did the corporation itself have any control or anything to do with the actual issuance of voting trust certificates?

Mr. Winter: Oh, if the Court please, the trust agreement is in evidence and is the best evidence of that fact. What [128] authorities they had to

(Testimony of Franklin T. Griffith.)
issue stock or what authorities they had to sell stock or anything of that nature.

Mr. Phillips: I will withdraw the question.

The Court: Now, Mr. Phillips, the way Mr. Winter and I try these cases, he is very aggressive, as you can see, and he makes his objections and then I let everything in subject to the objection, and then I decide at the end whether he is right or I am, so we will just move along now with that working understanding.

Mr. Phillips: All right, your Honor.

Q. Well, did the corporation have anything to do with the actual issuance of voting trust certificates?

A. The directors of the corporation, as I say, fixed a price at which the stock might be sold. The voting trust agreement, as Mr. Winter properly says, declares what shall be done with the stock. All stocks were sold by agents of the voting trust certificates—of the voting trust, and the voting trustees authorized the issuance of voting trust certificates, provided the sale be made in accordance with the specifications made by the directors of the corporation.

Q. And who was the agent of the voting trustees for the purpose of issuing trust certificates?

A. Title & Trust Company.

Q. Title & Trust Company. They kept the books down there and issued the certificates?

(Testimony of Franklin T. Griffith.)

A. Altogether. [129]

Q. Now, at the time the——well, first let me ask you, was the capital increased of the corporation?

A. Yes, increased from three hundred fifty thousand shares of one dollar par value stock to seven hundred fifty thousand shares of no par value stock.

Q. That is shown in the minutes?

A. Yes.

Q. Now, at the time of the increase in capital stock how many additional shares were issued to the voting trustees? A. 155,000.

Q. And were the voting trustees authorized to sell that stock and issue voting trust certificates for it?

A. They were. The minutes will disclose that.

Q. And did you follow the same procedure on that additional 155,000 shares which were issued with respect to the previous trust certificates?

A. In the matter of authorizing the Title & Trust Company to issue them?

Q. Yes. A. Yes.

Q. Now, on the question of these options, in the minutes in January of 1931, the minute book, there is shown——

A. '32, isn't it?

Q. '32, January, 1932, there is shown three resolutions there relative to extending or granting of options to Mr. Stock and [130] Mr. Battleson

(Testimony of Franklin T. Griffith.)

and yourself. Were any of those options ever taken up by any of those individuals?

A. No.

Q. Was there ever any money paid by any of those individuals on account of the stock covered by those options? A. No.

Q. And was there ever any stock or voting trust certificates issued by reason of those options?

A. Not at all. The options were——

Mr. Winter: If the Court please, the options are right in evidence. I submit that that is a matter that should be testified, not from memory of what they provide, but what they actually are.

The Witness: I can read from the book, but I can do it just as well by repeating it.

Mr. Winter: I have no objection to him reading the options into the record from the——

Mr. Phillips: Q. Was there ever any acceptance by any of the individuals, either Mr. Battleson or Mr. Stock or yourself, of the option as shown in the minutes? A. No.

Q. No acceptance of any kind?

A. May I supplement that answer? The corporation needed more capital. The enterprise had cost up to that time considerably more than the original forecast, as almost invariably happens [131] in such a venture. We had considerably over a hundred thousand dollars in a well that was going to be drilled originally for seventy-five, and Battleson and I were rather large stockholders.

(Testimony of Franklin T. Griffith.)

We were willing to loan money then, but we weren't willing to buy more stock. The last stock we had bought prior to that was paid for at one dollar a share. We knew that if the corporation was to proceed it would need more money. We loaned money to the corporation, each of us, $10,000, in addition to our other stock holdings. Then we had this in mind, that if we were coming in as a rescue party at that particular stage of the development and lending money to the corporation when it was far more uncertain as to what would be found or whether anything would be found, that we ought to have the right to buy more stock if we succeeded in bringing in a well by the first day of July, 1932, at the maximum price of one dollar per share, which was more than anybody had paid for the stock that I know about except myself, and the option was put into the minutes at that time, that the directors would, if the——

Q. And the loans that were made to the corporation, they have subsequently been repaid in cash by the corporation?

A. Well, we got back our loans, but we haven't gotten back our stock investment by any means.

Q. That is, there is no part of these loans that was ever applied upon the purchase price of any of this stock or trust certificates mentioned in the option? [132] A. Oh, no.

Q. That was repaid to you in cash?

A. Yes, after the well was sold.

(Testimony of Franklin T. Griffith.)

Q. In each instance? A. Yes.

Q. Now the subsequent——

A. There were additional loans as well as those, that original ten thousand.

Q. Yes. The subsequent history of the corporation which may or may not be of interest to the Court, is the corporation still in existence as such?

A. Yes. It is just in existence only for the purpose of clearing up its affairs.

Q. Has it been dissolved as a corporation?

A. It has been dissolved and is operating today solely for the purpose of collecting what we can get from the United States Government in this outrageous tax that we are contesting at this moment and then distributing to the stockholders, who are in grave need of it.

Mr. Winter: We will ask that the witness' statement of an outrageous tax be stricken as a conclusion and prior to the determination of this case. That is one of the questions that is involved here.

Mr. Phillips: I think you may cross examine.

[133]

Cross Examination by Mr. Winter:

Q. I think you have stated, Mr. Griffith, that the corporation was organized in April, 1931, with an authorized capital stock of $350,000?

A. I said it was organized at $350,000, but I didn't say when it was organized.

Q. Was it organized in about April, 1931?

(Testimony of Franklin T. Griffith.)

A. I think so. The minutes are the best evidence.

Q. The minutes will show that. And on May 1st, 1931, your brother, C. R. Griffith, and four others——were you one of the subscribers?

A. Yes.

Q. Is it not a fact that Mr. Griffith, C. R. Griffith, your brother, and you and three others subscribed for all the stock of the corporation by assigning the oil and gas lease on 80 acres of land in Big Horn County?

A. No. My brother subscribed for all but four shares, I think, but the four shares subscribed for by the other four were paid for at one dollar apiece.

Q. A dollar apiece. The other four subscribers were one share each? A. One share each.

Q. And your brother, C. R. Griffith, by his subscription, which is on page 5 of Plaintiff's Exhibit 3, sets forth the subscription [134]

A. Yes. It is there.

Q. Yes.

Mr. Winter: You can check this with me, Mr. Phillips.

Mr. Phillips: That is all right, I know it by heart.

Mr. Winter: Q. Now, as a condition for the subscription your brother agreed to donate back to the corporation 349,996 shares of the capital stock so subscribed and paid for, did he not?

(Testimony of Franklin T. Griffith.)

A. Not just that way, Mr. Winter. What he said was that if the voting trust agreement was approved that he would donate 349,000 shares that he sold to the voting trustees for the benefit of the corporation. I think that is the substance of it.

Q. Of course, the subscription itself will show the basis upon which he subscribed for that stock?

A. Yes. The record is there and it will show, as you say.

Q. Now, the succeeding page, the acceptance of the subscription by the corporation, apparently by the corporation, is found on page 11 of the minutes.

A. Well, I can't say about that. I don't know what page it is on, but the acceptance is there somewhere.

Q. Now, there was issued to Mr. Griffith, C. R. Griffith, stock certificate No. 1, par value shares of stock, in the amount of 349,996 shares, was there not? A. I think so.

Q. And there was issued to you and the other three subscribers [135] one share?

A. Yes, sir.

Q. Certificate No. 1 further shows, does it not, that your brother, C. R. Griffith, assigned and transferred that certificate in blank to the trustees, he assigned it to the trustees?

A. The assignment would be the best evidence of that. I don't remember just how it was worded. You have it here.

(Testimony of Franklin T. Griffith.)

Q. Yes. And then later that certificate was surrendered and canceled when the certificate No. 6 of 505,000——no, and 349,000——no, and certificate No. 6——will you just look at the record?

A. I have it.

Q. Now, certificate No. 6 dated September 2nd, 1931, was issued by the plaintiff corporation to the voting trustees transferring 349,995 of such shares?

A. That is correct.

Q. Then subsequent to the changing or the amending of the Articles of Incorporation of the plaintiff corporation from 350,000 of one dollar par shares to 750,000 shares without par, certificate No. 7 for 505,000 shares, which includes the 349,995 and the 155,000 shares here in issue, that that certificate was issued to the voting trustees?

A. The minute book shows certificate No. 7, 505,000 shares issued to Franklin Griffith, C. R. Griffith and H. F. Waechter [136] as trustees, April the 5th, 1932.

Q. April 5th, 1932. Now, that included the 349,995 shares originally issued to your brother, C. R. Griffith, and 155,000 shares thereafter subscribed for of the new stock, the new non par stock?

A. Yes, that is correct, except that——

Mr. Phillips: Just a minute. Don't you mean the 349,000 originally issued on certificate No. 6 to the trustees?

Mr. Winter: Yes.

(Testimony of Franklin T. Griffith.)

Mr. Phillips: That is what you mean?

Mr. Winter: Yes.

Mr. Phillips: That is what I thought.

The Witness: Certificate No. 6 to the three voting trustees was for all of the stock except the qualifying share of the directors while it was still a par value stock.

Mr. Winter: Q. Yes. Well, the certificate No. 7 for 505,000 shares was in lieu of the certificate of 349,995 and the 155,000 new shares?

A. Let me say it in this way: The 349,000 shares certificate issued to the trustees of par value stock was surrendered and new no par value stock issued in lieu of it, together with 115,000 additional shares of no par value stock, which makes up the 505,000 shares of no par value stock then vested in the voting trustees.

Q. Yes. When the stock in the plaintiff corporation was—— [137] when the Articles of the plaintiff corporation were amended increasing the number of shares, all the increased shares had to be subscribed for, didn't they, the 155,000?

A. No, they wouldn't have to be subscribed for. They were authorized for issuance and sale.

Q. Issuance and sale.

A. By the voting trustees.

Q. You say for sale——

A. I have forgotten whether there were 155,000 shares or not. The records will show that.

Q. The records will show that.

(Testimony of Franklin T. Griffith.)

A. But there was no formal subscription for it. The 155,000 shares that were issued to the voting trustees were handled in the same manner as the 349,995 shares. I may say, Mr. Winter, I don't think there was a formal subscription for it, nor was there one necessary under the law of Oregon. After a corporation has had subscribed the majority of its capital stock upon the organization of the corporation, further distribution of stock may constitute a legal subscription, but a formal subscription is not necessary.

Q. Yes, as long as it is paid for?

A. Yes.

Q. Of course, the additional 155,000 shares had to be subscribed for by somebody, didn't they, whether it was a formal subscription or not? [138]

A. Well, no, it need not be subscribed for. It is issued.

Q. Issued upon payment?

A. Well, the directors of the corporation have the right unquestionably in case of no par value stock to fix the value at which that stock shall be disposed of, either directly by the sale of the stock to the purchase or by indirection through voting trust. It was done through the voting trust in this case.

Q. Now, at the time of the increase and change in the capital stock of the plaintiff corporation the stockholders adopted certain resolutions, didn't they?

(Testimony of Franklin T. Griffith.)

A. Oh, that is necessary under the statute, yes. The increase, of course, was voted by the voting trustees who were then the holders of all the stock of the corporation. I think you will find that the action of the stockholders in voting the increase in capital stock and the change of the character of the stock from par to no par, was voted by the voting trustees as to all but five shares and by the individual directors as to their individual shares.

Q. Well now, when the stock of the plaintiff corporation was increased and the change from par to no par——no; it was not changed from par to no par at that time. The plaintiff corporation agreed to purchase all of the stock of the Big Horn Oil & Refining Company, amounting to a hundred thousand shares, did they not? [139]

A. I don't think there were quite a hundred thousand shares outstanding.

Q. Well, calling your attention to the minutes of the adjourned meeting of the board of directors of the Portland Associates, Inc., on page 41 of the minute book: "The directors of Portland Associates, Inc., met at the office of Franklin T. Griffith, Electric Building, Portland, Multnomah County, Oregon, at 3:00 P. M. on January 27, 1932, pursuant to adjournment, there being present at said meeting the following directors, to-wit: Franklin T. Griffith, E. W. Battleson, M. F. Swift.

"The president and vice president both being absent Mr. Franklin T. Griffith was elected

(Testimony of Franklin T. Griffith.)

chairman of the meeting and Mr. M. F. Swift acted as secretary.

"Mr. Paul Stock was present at the meeting, representing the stockholders of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, and on behalf of the stockholders of said company made the following proposal:

"That Portland Associates, Inc., purchase all of the stock of said Big Horn Oil & Refining Company, amounting to 100,000 shares, and issue in payment thereof 95,000 shares of the capital stock of Portland Associates, Inc., said 95,000 shares to be issued as follows:"

And there follows a list of——

A. Various stockholders of the Big Horn Company. [140]

Q. Jess Tingle, 2000 shares; E. J. Fleming, 10,000 shares; Mrs. E. E. Fleming, 2,000 shares; T. R. Graham, 1,000 shares; J. E. Simon, 500 shares; R. J. O'Malley, 2,000 shares; J. G. Everett, 19,000 shares——

The Court: How long is that list?

Mr. Winter: Two more, your Honor.

Q. (Continuing) ——G. H. Downs——

The Court: I was wondering if you are reading the same list I have. It is quite long.

Mr. Winter: Oh, no, your Honor.

Q. (Continuing) ——Paul Stock, 57,500 shares.

(Testimony of Franklin T. Griffith.)

(Reading) "Mr. Stock then presented an audit of the books of said Big Horn Oil & Refining Company as of December 31, 1931, and agreed that in consideration of the purchase of the stock of said company by Portland Associates, Inc., in accordance with the foregoing proposition and as a part thereof, that he would pay or cause to be canceled the following indebtedness of said Big Horn Oil & Refining Company as shown by said audit, to-wit: Paul Stock, $3,929.45; E. J. Fleming, $3,500.00; J. G. Everett, representing the claim of Associated Independent Dealers, $1,331.72; J. G. Everett, $1,000.00, and as a further consideration for the assumption of said indebtedness of Big Horn & Refining Company, Mr. Stock requested that he be given an option to purchase 15,000 shares of the capital stock of Portland Associates, Inc., at $1.00 per share, said option to be [141] open until July 31, 1932.

"Whereupon upon motion duly made and seconded the following resolution was unanimously adopted:

"RESOLVED That this corporation purchase all of the capital stock of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, in accordance with the proposition which has been submitted to this corporation by Mr.

(Testimony of Franklin T. Griffith.)

> Paul Stock, representing the owners of all of the issued and outstanding stock of said Big Horn Oil & Refining Company, and in payment therefor issue 95,000 shares of the capital stock of this corporation as follows:"

Then follows the list that I read before, so I won't repeat that.

> (Reading) "BE IT FURTHER RESOLVED That in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company as shown by the audit of the books of said company of December 31, 1931, to-wit:" Then follows the list of the indebtedness which I just read before. "This corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932."

Well now, then there appears some tendering of resolutions which, unless counsel wants read, I have no interest in, in electing—— [142]

A. There is the same question as to the assessment of the tax against that option.

Q. And then a little further, "Mr. E. W. Battleson offered to lend the corporation the sum of $10,000 in consideration of its granting to him an option to purchase stock of the corporation at $1.00 per share at any time prior to July 31, 1932. Where-

(Testimony of Franklin T. Griffith.)

upon upon motion duly made and seconded the following resolution was unanimously adopted:

> "RESOLVED That in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share",

and a similar resolution upon the consideration of your loaning the corporation $10,000——well, I had better read it.

> (Reading) "Mr. Franklin T. Griffith offered to lend the corporation the sum of $10,000 in consideration of its granting to him an option to purchase stock of the corporation at $1.00 per share at any time prior to July 31, 1932. Whereupon upon motion duly made and seconded the following resolution was unanimously adopted:
>
> "RESOLVED That in consideration of his lending this corporation the sum of $10,000, Mr. Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, [143] 1932, at the price of $1.00 per share".

Subsequent to that then appears the resolution:

> "WHEREAS Mr. Paul Stock agrees to assign to the corporation 32.75 acres of land in

(Testimony of Franklin T. Griffith.)

> exchange for 35,000 shares of the capital stock of the corporation'',

and the resolution accepting the offer. I don't think it is necessary to read that.

A. What is your question?

Q. Now, to the extent of 95,000 shares, this was included in the 155,000 new shares issued. Do you understand my question?

A. No, I wouldn't say it was a part of the one hundred and fifty-five, I am not sure of that. It is part of the 505,000.

Q. Part of the 505,000?

A. Yes. That resolution, by the way, is——

Q. Well, the 349,000 shares had been fully paid for and subscribed by your brother, and——

A. It was all in the hands of the trustees. What Mr. Stock got, that is the part I want to refer to. That resolution is incorrect where it refers to capital stock. What was dealt in was voting trust certificates. That is all that was issued.

Mr. Winter: Now, I ask that that answer be stricken. It is a conclusion, and the record speaks for itself, the minutes of the board of directors, and it was voluntary. No question was asked, and I ask that it be stricken.

The Court: I will reserve decision.

The Witness: I would ask the Court to permit me to amplify [144] my answer to the question.

Mr. Winter: Q. Well, Mr. Griffith, you have been an attorney for forty-four years here and I

(Testimony of Franklin T. Griffith.)

know that your counsel is supposed to take care of you.

A. Because I have been a practicing attorney for forty-four years I have some little knowledge of the rules of evidence.

Q. Well, never mind.

A. But on that point, and just while you are on it, it is better to discuss that at this time, I think, if I may.

Q. Well, Mr.——

The Court: Go ahead, I want to hear his statement.

A. Evidence of ownership of the stock, capital stock, ever issued by the corporation was held, four shares by the directors, the original subscribers, and all the rest of it was at all times held by the voting trustees. This resolution——

Mr. Winter: Q. Who got all the money for selling the stock?

The Court: Let him finish, Mr. Winter.

Mr. Winter: I thought he was through. Sorry.

The Witness: This resolution is a little carelessly drawn when it speaks about capital stock as having been issued to the owners of the Big Horn Oil & Refining Company. The reference to capital stock there was really a reference to the voting trust certificates, and the records now in evidence will show that no capital stock was ever issued to Mr. Paul Stock, and the shares that were issued were voting trust certificates only. [145]

(Testimony of Franklin T. Griffith.)

The Court: Now your question, Mr. Winter?

The Witness: Who got the money?

Mr. Winter: Q. Can you tell the Court what the corporation received for that 155,000 new shares?

A. Varying prices for the stock as it was sold by agents of the corporation, who made sales in accordance with the directions of the directors, as also shown by the minutes, and advised the voting trustees to turn the money to the treasury of the bank, whereas the treasurer of the corporation authorized them to issue voting trust certificates.

Q. Well, on all the certificates that were deposited with the voting trustees then they issued voting trust certificates as representing that stock turned in?

A. Well, yes. The voting trustees received the right——

Q. Now, in your resolution at the time to increase and change the capital stock, I find this:

> "Resolved that each and every share of said increase of capital stock so issued, sold or disposed of shall be under and subject to all of the terms and conditions of that certain voting trust agreement entered into May 1, 1931, by and between the stockholders of Portland Associates, Inc., and Franklin T. Griffith, C. R. Griffith and E. M. Steell, Trustees, under which agreement Henry F. Waechter has been

(Testimony of Franklin T. Griffith.)

> substituted for E. M. Steell as such trustee. There shall be issued to each purchaser of any part of said increase of capital stock voting trust certificates under said voting trust [146] agreement and there shall be issued to said Trustees for the benefit of such purchasers certificates of stock for a corresponding number of shares so sold, the same to be held by said Trustees under said voting trust agreement for the use and benefit of the purchasers of said units, the money paid for said units to go into the corporate treasury for the use and benefit of Portland Associates, Inc."

That resolution was adopted by the stockholders of the corporation, was it not?

A. The minutes so recite it.

Q. That is the situation. Now, whenever a purchaser of any part of the capital stock, of the increase in capital stock, purchased stock he was not given the stock but he was given a voting certificate?

A. He was not purchasing stock, he was purchasing a voting trust certificate entitling him to receive the evidence of legal title of a share of stock at the expiration of the voting trust.

Q. Well, the corporation sells the stock, doesn't it?

A. It transferred the stock to the voting trustees, so the control would be left there. The pur-

(Testimony of Franklin T. Griffith.)
chaser received only trust certificates, that is what he bought, that is what he got.

Q. That is what he got, but it was represented share for share of corporate stock, was it not?

A. Everybody understood when they bought the stock or the voting trust certificates they were buying voting trust certificates, [147] which would entitle them to a certificate of stock for the same number of shares at the expiration of the voting trust.

Q. Well, the corporation didn't have any voting trust certificates to sell representing that increase in stock until it was paid for?

A. Of course not.

Q. No.

A. But the voting trustees were acting there for the benefit of the corporation and its stockholders and holders of the beneficial certificates. I don't know just what is running around in the back of your head, Mr. Winter, but I do know the facts of this matter and I know just what occurred.

Q. Well, no stock certificates in the corporation were actually issued to the new subscribers or the new purchasers representing the increase in capital stock, were there? A. No.

Q. That was all in one certificate that went—505,000 share certificates that went to the trustees?

A. The only certificates that were held by those purchasing interest in the corporation were voting trust certificates.

(Testimony of Franklin T. Griffith.)

Q. Now, upon the expiration of the voting trust if it had been canceled those purchasing would have been entitled to a share of stock in the corporation, would they not? A. Yes.

Q. Yes, and their voting trust certificate represented a share [148] of stock in the corporation deposited with the depositor of the voting trust?

A. Representing the right at the expiration of the voting trust to receive a share of stock.

Q. And as I understand your counsel, you are not contesting the transfer by one holding a voting trust certificate to another purchaser of a voting trust certificate?

A. No, we have paid that tax.

Q. That would be a transfer of voting trust certificates.

A. Mr. Phillips in his wisdom didn't think it was worth while contesting that, and the government has the money.

Q. Now, when you say there was no consideration for the granting of these options which are read in the resolution, you mean that you didn't purchase any of that, you didn't exercise that option? A. Never did.

Q. Don't you think you had a right to exercise that option, a legal right to have exercised that option up until July 31st, 1932?

Mr. Phillips: Just a moment. I will have to object to that, your Honor, as asking for a con-

(Testimony of Franklin T. Griffith.)

clusion as to whether or not he had the right. The record here speaks for itself.

The Court: I would like to hear his answer.

A. I would like to hear it. Yes, unquestionably I would have had the right to do it, but I would have to do it in the absence of that record. [149]

Mr. Winter: Q. Not if the corporation didn't want to sell you any of the stock you wouldn't have had the right, would you?

A. I was very largely the corporation.

Q. And that is the reason?

A. No. I want to have a record there, Mr. Winter, to be frank with you, that as an insider if there was to be any insider in a successful enterprise, that I was not asking for any right to buy the stock on any more favorable terms, notwithstanding the amount of money that I had in it, than it was sold to the general public. That was the whole point.

Q. Now, Mr. Griffith, irrespective of the fact that someone else could have, you were still granted an option under that resolution to purchase 10,000 shares of stock because you had loaned the corporation ten thousand dollars, isn't that a fact?

A. That was a part of it.

Q. Yes. You didn't exercise it because you could have bought it on the market maybe at 30 cents, is that right?

A. I never bought a share on the market. I never bought a share of it except with money that

(Testimony of Franklin T. Griffith.)

went directly into the corporation.

Mr. Winter: I don't think there is anything else, your Honor. I think that is all.

The Witness: At that time——may I add this without offending your ideas about procedure? At that time there had been no——

Mr. Winter: If the Court doesn't stop you, I won't.

The Witness: If we could find anybody else willing to pay one [150] dollar a share for that stock——Battleson and I loaned it because they couldn't get the money anywhere else.

Redirect Examination by Mr. Phillips:

Q. Those resolutions he read with reference to the options in the minutes, those are the same ones that I referred to in my direct examination, and I think those are the ones you referred to in your answers then, that there was nothing paid, never accepted, and no stock or voting trust certificates ever issued to any of the people mentioned?

Mr. Winter: Now, if the Court please, there are no less than five questions in that. Now, when he said there was no money paid, there was a loan here of ten thousand dollars, and the resolution so provides, and that was the reason for granting it. He gave something for granting that right. I will submit that——

Mr. Phillips: Well, I will break the question up, then if it is more convenient for you, so that you can make one objection to a part of it.

(Testimony of Franklin T. Griffith.)

Q. With reference to those same resolutions that he read, was there ever any other writing of any kind between the corporation and you and Mr. Battleson and Mr. Stock with reference to those options and what is shown in those minutes?

A. None.

Q. Was there ever any acceptance by any one of you of those options? [151]

Mr. Winter: Now, just a minute. We will object to that as a conclusion, as to whether or not it is necessary for him to accept, and it is irrelevant, and asks for a conclusion as to whether or not an option—whether or not an option has been granted, that is the only question here.

The Court: Admitted subject to the objection.

Mr. Phillips: Q. Was there ever any money paid by any of you on account of those options referred to in those resolutions?

A. We paid nothing for the option. We loaned ten thousand dollars to the corporation, each of us, and that money, when the properties were finally sold, was repaid to us.

Q. That was evidenced by notes, was it?

A. Evidenced by notes.

Q. And those notes were paid by the corporation?

A. Paid by the corporation when it was finally liquidated.

Q. But there was nothing paid for the pur-

(Testimony of Franklin T. Griffith.)

chase of any stock under these purported options?

A. No, nothing.

Q. And no stock or trust certificates ever delivered to any one of you on account of it?

A. None.

Q. Now, with reference to the Big Horn Oil & Refining Company referred to in the resolution read from the minutes of the same day, it refers to shares of stock of the corporation, but did the corporation have anything outstanding at any time other than voting—— [152] other than the stock in the name of the voting trustees?

A. No capital stock of the corporation has ever been outstanding other than that held by the voting trustees and the five directors, qualifying shares.

Q. And these stock certificates, or these trust certificates——well, I will state it another way. Were voting trust certificates issued to this list of Big Horn Oil & Refining Company stockholders representing the number of shares as shown in the minutes?

A. They were all given voting trust certificates for the number of shares represented by that——

Q. And those were included in the list of voting trust certificates that are attached to the complaint in this case, I take it, the same list of all the voting trust certificates?

A. They would be included therein.

Mr. Phillips: I think that is all.

(Testimony of Franklin T. Griffith.)

Recross Examination by Mr. Winter:

Q. Mr. Griffith, when you say there was no stock outstanding, all the stock to the extent of 505,000 shares was eventually outstanding and deposited with the voting trustees under a trust agreement?

A. I said there was none of it outstanding except that which was issued to the voting trustees and the five original directors.

Q. Well, there was a stock certificate No. 1 to your brother [153] for 499,000 which was then assigned and transferred to the voting trustees which was outstanding at the time it was issued to him, was it not?

A. I have just answered that. He was a voting trustee and one of the original directors. None of the stock of the corporation has ever been outstanding except that which was held by the five original directors and the voting trustees.

Q. Well, at the time—then you mean at the time the stock certificate No. 1 was issued to C. R. Griffith, one of the originals who really subscribed to all the stock with the exception of one dollar, it was outstanding then in his name?

A. Yes, but he was one of the five directors. That is the answer I have just given you.

Q. Well, he didn't continue as one of the five directors, Mr. Griffith.

A. Well, neither did I as a director. I held and hold today one share of the capital stock, actual

(Testimony of Franklin T. Griffith.)

capital stock of the corporation. Each of the five directors must hold at least a share under the laws of this state to be qualified to act.

Q. And that has not been deposited with the voting trustees?

A. Never. It is held individually, and those are the only shares of capital stock that are held by anybody other than the voting trustees.

Q. And when you say "held", you mean deposited under the trust?

A. I do not; I mean owned. The legal title is still in the [154] voting trustees. They have outstanding voting trust certificates.

Q. Voting trust certificates have been issued to them as trustees?

A. No, the shares of stock were issued to the voting trustees. The voting trustees in turn have issued voting trust certificates.

Q. Representing their shares of stock so deposited or so held by them?

A. Representing the shares of stock issued originally to the voting trustees and still held by them. Get this point——

Q. You mean the certificates which were originally issued?

A. Pardon me, but I want to make this a little bit more elaborate. No purchaser of voting trust certificates was ever, except my brother and the four directors, was ever the owner of any shares of

(Testimony of Franklin T. Griffith.)

the capital stock of the corporation itself. This voting trust was not one whereby a large group of capital stockholders surrendered their capital stock to a voting trust and received voting trust certificates. The original issuance of the stock, with the exception of the 349,000 shares originally issued to my brother, were issued only once, and then issued to the voting trustee. 155,000 shares of capital stock was never held by anybody except the voting trustees.

Q. Well, the corporation by its resolutions authorized the issuance of 95,000 shares of its capital stock to the stockholders of the Big Horn Oil & Refining Company in the resolution of Janu- [155] ary 27th, 1932, didn't it?

A. It authorized that according to the resolution, which I have just explained to you was not the intention, and it was not done.

Q. But it was included in the 505,000 shares and stock certificates issued in lieu thereof?

A. Well, it was issued apart by the voting trustees from the block of 505,000 shares of actual capital stock held by the voting trustees, but I have just explained to the Court that 95,000 shares referred to therein was erroneously described as capital stock.

Q. You don't——

A. Just a moment. When the intention was to convey to them voting trust certificates which in

(Testimony of Franklin T. Griffith.)

fact were issued to the original stockholders of the Big Horn Company. They never held any shares of the capital stock of the corporation. They held——

Q. Stock in the corporation has to be originally issued, doesn't it?

A. It has been issued, as I have explained a half a dozen times, only to the voting trustees.

Q. And it is issued to the person or persons paying for it?

A. Not necessarily. It may be received——

Q. Well, unless they transfer their right to receive it to somebody else?

A. No, that isn't it at all. They don't transfer their right because what they buy in the first place is a voting trust certi- [156] ficate.

Q. Where on the corporation's records does it show that—indicate that the corporation sold voting trust certificates?

A. Well, I think that the resolutions of the directors there direct and authorize the voting trustees to sell voting trust certificates for the benefit of the corporation.

Q. Well, your resolution at the time of the increase of the capital stock says that, "There shall be issued to each purchaser of any part of said increase of capital stock voting trust certificates under said voting trust agreement and there shall be issued to said Trustees for the benefit of such

(Testimony of Franklin T. Griffith.)

purchasers certificates of stock for a corresponding number of shares so sold".

A. Exactly. That is what happened. The purchaser received voting trust certificates.

Q. And here again on page 41 of Plaintiff's Exhibit 3, being the minutes of the adjourned meeting of the board of directors of the plaintiff corporation,

> "That Portland Associates, Inc., purchase all of the stock of said Big Horn Oil & Refining Company, amounting to 100,00 shares, and issue in payment thereof 95,000 shares of the capital stock of Portland Associates, Inc., said 95,000 shares to be issued as follows:"

A. I have explained that several times. That 95,000——

Q. You contend that the resolutions are all wrong?

A. I do not. I say that they are incorrect in referring casually to capital stock when what was meant was the voting trust [157] certificates, which was in fact issued.

Q. Well, the corporation couldn't issue voting trust certificates, could it?

A. It authorized the issuing of them.

Q. But not until the shares of stock were placed in the trust?

A. Well, the voting trustees couldn't very well authorize the issuance of the certificates unless they owned the stock.

(Testimony of Franklin T. Griffith.)

Q. No. Then until the 95,000 shares which were exchanged for the—or the rights to the 95,000 shares was exchanged for the stock of the Big Horn corporation, the trustees could not issue trust certificates?

A. The trustees could do this: They could authorize the issuance of a voting trust certificate, knowing that the stock would be issued to them by the corporation. Practically, the transaction was simultaneous.

Q. Of course, all the authority the voting trustees had under the voting trust agreement is that shown by the voting trust agreement?

A. That is true, except in their other capacities. But as voting trustees their powers were limited by the voting trust.

Mr. Winter: I think that is all.

Mr. Phillips: That is all.

Mr. Winter: Oh, pardon me, Mr. Griffith, I wanted to ask you one question.

Q. There appears to be on page 27 of this minute book, something [158] has been torn out. Do you know anything about what it was in the minute book?

Mr. Phillips: I might explain that. I am secretary of that corporation now, and that has been that way ever since I received the minute book, and I haven't changed it at all, and I have often wondered——

(Testimony of Franklin T. Griffith.)

The Witness: Does it break into the continuity of the record?

Mr. Phillips: No, it doesn't seem to break the continuity of the record, but I don't know what was in there or why it was ever removed. That is the same way it was when I got it, I think, in 1934.

The Witness: It may be a footprint without significance, but it may have something to do with it, I don't know.

Mr. Winter: Apparently the page is marked 27, and I think counsel will agree that it looks like something has been taken out. Now, whether it was something that is irrelevant and immaterial to the records of this company, I don't know. It might be a subscription for the new hundred and fifty-five thousand shares, or it may have been something else, I don't know.

Mr. Phillips: I might say that so far as this stamp tax is concerned, the stamp tax was levied after I was secretary, and you examined these books in our office.

The Witness: Did you take that out? I turned this fellow loose for three or four days with these books. I don't know what he did with them. [159]

(There was a further discussion off the record.)

(Witness excused.)

The Court: We will take a short recess.

(Short recess.)

Mr. Phillips: Call Mr. Lommel.

LEO C. LOMMEL

was thereupon produced as a witness in behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Phillips:

The Clerk: Your name, please.

A. Leo Lommel.

Mr. Phillips: Q. Mr. Lommel, what is your occupation?

A. Assistant trust officer, Title & Trust Company.

Q. And how long have you been there in that capacity? A. About four years.

Q. And prior to your time have the assistant trust officers done the same duty as you do now?

A. Yes.

Q. Since you have been there have you had charge of the issuance and transfer of any voting trust certificates under the voting trust agreement that has been mentioned here in this case?

A. I have.

Q. You have been here during the testimony and heard what we are [160] talking about?

A. Yes.

Q. Now, will you tell the Court what mechanics you go through in the issuance of voting trust certificates—well, rather, before that, I will have you identify the books here first.

The Court: Mr. Phillips, he testified that he heard what we were talking about, but I wonder if he knows what we were talking about.

(Testimony of Leo C. Lommel.)

Mr. Phillips: Well, I think it would be unusual if he did, as long as nobody else understands it thoroughly yet, apparently.

Q. I will hand you what appears to be the voting trust certificate books, and I will ask you if those are the voting trust certificate books that have been used for the issuance of voting trust certificates? A. These are.

Q. Under that trust. Now, there are seven of them there, and is that all of the voting trust certificate books?

A. There are six. Those are all.

Q. Six. That is all of them, six?

A. Yes.

Q. And are there any other voting trust certificate books or stubs under this trust?

A. No, these are all of them.

Q. These are all. [161]

Mr. Phillips: Can these be admitted under the same stipulation as the others?

Mr. Winter: Yes.

Mr. Phillips: We will offer these in evidence.

Mr. Winter: No objection. And it may be stipulated that the Court may read them all.

(The six voting trust certificate books so offered were received in evidence and marked Plaintiff's Exhibits Nos. 5, 6, 7, 8, 9 and 10, respectively.)

Mr. Phillips: Q. Now, just explain to the Court, will you open that book and explain to the Court

(Testimony of Leo C. Lommel.)
what you did when you issued a voting trust certificate and what notations you made in the stub in the book.

A. In issuing voting trust certificates we issue the number of shares first, then the name to whom it was issued, the address, the date; on the next line we would indicate whether it was an original issue or an assignment.

Q. And when there was an original issue how would you designate it?

A. We would designate that by the initials "O. I."

Q. "O. I." The "O. I." then in that space refers to an original issue in each case?

A. That is right.

Q. And on transfers you would indicate there was a transfer?

A. On transfers we would indicate the number of the certificate [162] from which it was transferred.

Q. I see. Now, you issued voting trust certificates only upon the authorization of the trustees?

A. Of the trustees, yes.

Mr. Phillips: You may cross examine.

Cross Examination by Mr. Winter:

Q. When you say you indicate the original issue do you mean that would be the original certificate which would be issued against—the first time it would be issued against a particular share of stock, is that what you mean? A. That is right.

(Testimony of Leo C. Lommel.)

Q. That wouldn't mean that it would be issued to the person who necessarily deposited that stock with the voting trustee? A. No.

Q. Now, on the transfers, you mean you indicate whether they were transferred—where a certificate had been issued to someone else and now a new certificate in lieu thereof was being issued?

A. It would be the transfer of an original certificate, of an original issued certificate.

Q. Of an original issued certificate?

A. Yes, or a certificate that had been transferred and then transferred again.

Q. Now, of course you understood that there were two hundred [163] and forty-nine thousand shares of stock which were deposited by the corporation? A. There were 505,000 shares.

Q. They were all deposited there?

A. Deposited with us.

Q. Yes. That was in the one certificate, No. 7, which is in evidence?

A. In one certificate. I don't recall the number.

Q. You don't remember the number. Now, where did you get your authority to issue trust certificates? Who gave you that authority and in what form was it, if any?

A. We received written instructions signed by—the ones that I have seen, Franklin T. Griffith?

Q. Do you have those authorizations with you?

A. I do, at least some of them.

(Testimony of Leo C. Lommel.)

Q. Do you have them all there in the one bundle?

A. No. Well, they are in amongst other papers. Here are some of them.

Mr. Phillips: Were they all substantially in the same form?

A. Yes, they were all in letter form, typewritten and signed by Franklin T. Griffith.

Mr. Winter: Q. You didn't indicate in what capacity he signed it; he just signed it Franklin T. Griffith?

A. That is the way he signed them, yes.

Q. Did you understand that Franklin T. Griffith was the depositor [164] of the shares of stock with the trustee for which you were issuing the trust certificates?

A. He was representing—he was one of——

Mr. Phillips: Just a moment. If the Court please, we object to that as asking for the conclusion of the witness. The record speaks for itself.

The Court: Admitted subject to the objection.

Mr. Winter: Q. Will you answer the question, Mr. Lommel? A. Answer that?

Q. Will you answer it, yes.

A. What was the question?

Q. Answer it, will you please? Do you remember the question?

A. What was it? I have forgotten.

Mr. Winter: Mr. Reporter, read the question.

(Thereupon, the reporter read the question.)

(Testimony of Leo C. Lommel.)

A. It was our understanding he was one of the trustees and depositing them for the trustees.

Q. He was one of the trustees?

A. The voting trustee.

Q. Were you familiar with the trust agreement?

A. To a certain extent, yes.

Q. Then you didn't understand that under the trust agreement the trust certificates were to be issued to the purchasers of stock, or depositors of stock? A. The trust certificate? [165]

Q. Yes. A. The voting trust certificates?

Q. Yes. A. No, I guess——

Q. You didn't know that. In any event, upon the receipt of the authorization from Franklin T. Griffith you issued certificates as specified in those——

A. That is right.

Q. And there was a letter of authorization issued to you, your company, for every trust certificate that was issued?

A. I take it we have a letter for each one. I haven't checked them personally, but I believe we have them in the files.

Q. Now, Mr. E. M. Steell also issued letters of authorization to you signed, "Very truly yours, E. M. Steell" on stock held by him?

Mr. Griffith: That was a transfer.

Mr. Winter: Q. (Continuing) "Please deliver to Mr. M. F. Swift or on his order 2,500 shares of Portland stock you hold of mine. Thanking you, I remain, Very truly yours, E. M. Steell", dated

(Testimony of Leo C. Lommel.)
April 20th, 1932, addressed to Title & Trust Company, Portland, Oregon.

A. Well, in that case we were evidently holding some for him pending instructions as to what certificate should be issued in lieu thereof.

Q. Calling your attention to a letter of June 20th, 1932, ad- [166] dressed to Title and Trust Company, 91 Fourth street, Portland, Oregon,

> "Gentlemen: Please issue the following voting trust certificates of Portland Associates: C. H. Griffith, one certificate for 1,476 shares; C. H. Griffith, one certificate for a thousand shares; C. H. Griffith one certificate for a thousand shares; C. H. Griffith, one certificate for 590 shares;"—and so forth and so on down there, a number of men, down to 7,000 shares—"Very truly yours, Franklin T. Griffith".

Were these certificates in substantially the—or these letters of authorization in substantially the same form as I have read?

A. As I recall it, they were practically the same, just a simple authorization or instruction to issue the various certificates.

Q. Calling your attention to a letter of March 1st, 1932,

> "Title and Trust Company, 91 Fourth street, Portland, Oregon. Gentlemen: Please make issues of original certificates as follows: N. A. Ledge, 500 shares; O. P. Taylor, 700 shares. Very truly yours, Franklin T. Griffith, Trustee, Portland Associates, Inc."

(Testimony of Leo C. Lommel.)

Now, does that letter of authorization have reference to some shares which were deposited in the name of the trustee, Portland Associates, Inc.?

A. I think that authorization would be just the same as one of the others, only perhaps that particular one was signed as trustee.

Q. You think the use of the words "Trustee, Portland Associates, [167] Inc." refers to the voting trust agreement rather than to Griffith as being trustee of some stock of the Portland Associates, Inc., or didn't you go into it?

A. I didn't go into that very thoroughly.

Q. As long as they were signed Franklin T. Griffith they weren't questioned?

A. Franklin T. Griffith, we took his instructions.

Q. Or anyone else who had some stock on deposit with you? A. Yes.

Q. I think you stated that on that original issue, that was the original certificates issued against the 505,000 shares which were originally deposited, is that right? A. That is right.

Q. Of course, as to who was the beneficial depositors of that stock, you don't know?

A. I don't know.

Q. No.

Mr. Winter: I think that is all.

Redirect Examination by Mr. Phillips:

Q. Do you act as agent of the voting trustees down there? A. Of the voting trustees.

(Testimony of Leo C. Lommel.)

Q. Yes, and Mr. Franklin T. Griffith was chairman of the voting trustees? A. He was. [168]

Mr. Phillips: That is all.

(Witness excused.)

Mr. Phillips: I want to recall Mr. Griffith for a question.

FRANKLIN T. GRIFFITH

was thereupon recalled as a witness in behalf of the plaintiff and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination by Mr. Phillips:

Q. You have already been sworn, Mr. Griffith. In regard to the letters, you have heard the reading of the letters here when Mr. Lommel was a witness?

A. Yes.

Q. Was that your usual way of authorizing the issuance of voting trust certificates, to write the Title and Trust Company a letter?

A. Yes. The Title and Trust Company had no control over any of the certificates except voting trust certificates.

Q. The Title and Trust Company had nothing to do with the issuance of stock by the corporation?

A. No.

Q. No. Was there any other stock on deposit, any other stock of the Portland Associates that was

(Testimony of Franklin T. Griffith.)

on deposit, or was there any other issued, even, except that which was under the voting trust agreement?

A. Never, except the four original shares held by the directors [169] after Charlie turned back his 249,000 shares. All this correspondence, of course, related to the disposition of voting trust certificates issued against the 505,000 shares of original stock held by the corporation. As I understand, the controversy here is that we claim that the original issue of that stock to the voting trustees was taxable and the tax has been paid and the voting trustees were acting in a representative capacity for the holders of the voting trust certificates, and that the taxes when originally issued was covered by the tax levied against the stock when it was issued first to the voting trustees, the same way as if it had been issued directly to each one of the purchasers of voting trust certificates. It is a double tax.

Mr. Phillips: You may cross examine.

Cross Examination by Mr. Winter:

Q. Well, all of the stock of the corporation was fully paid for before it was issued, was it not, to the voting trustees?

A. Paid for on the basis of what the directors had agreed it should be sold for after the change to no par value stock, yes.

Q. And the stock was never issued to the subscribers of the interest in the corporation, but it

(Testimony of Franklin T. Griffith.)

was issued direct to the trustees under that voting trust agreement?

A. The capital stock of the corporation itself, as I have explained to you, was issued directly to the voting trustees. The only evidence of ownership issued to the general public [170] purchasing voting trust certificates were voting trust certificates. Those are still outstanding.

Q. Well, the voting trustees were not subscribers to the stock, were they?

A. No. My brother was the original subscriber to the stock.

Q. The voting trustees were never subscribers to the stock?

A. No, they never subscribed to stock.

Q. No. They never paid for it themselves?

A. They paid for it as representatives of the holders of the voting trust certificates.

Q. Yes, for other people?

A. As the representatives of other people.

Q. As the representatives of other people.

A. And they held the title to the stock as such representatives.

Q. You don't contend, Mr. Griffith, that the stock was not in effect subscribed for although the words "Subscription through the additional 155,-000", no agreements were made, do you?

A. No, the stock was issued lawfully.

Q. Yes. A. And paid for.

Q. And——

(Testimony of Franklin T. Griffith.)

A. That is, the voting trust certificates were.

Q. And do you understand ordinarily that one, when he subscribes, whether it is by formal subscription or not, he is entitled to receive that stock he subscribes for if he pays for it? [171]

A. He is entitled to receive what he subscribes for, which in this case were voting trust certificates.

Q. Yes, representing the shares of stock?

A. That is what was originally issued.

Q. And upon the expiration of the trust agreement he would receive those shares of stock which are being held there for him?

A. He had the right to. He still has the right to, and they haven't exercised it.

Q. And in the trust certificate it expressly—in your trust agreement it expressly provides that it represents a particular number of shares on deposit there?

A. Surely. The voting trustees have no right to issue voting trust certificates for any stock that was not——

Q. Of course you understand that there is no tax liability on a corporation for an original issue of a trust certificate?

A. That is just the point.

Q. I mean to the person depositing the certificate there.

A. Well, that isn't the question. If you want to ask me what I understand the law to be, I will tell you. The stock of a corporation when issued to the

(Testimony of Franklin T. Griffith.)

voting trustees was subject to an original issue tax, which was paid, and is not in controversy. The controversy here in the principal amount is upon your contention that the holders of the voting trust certificates were entitled to receive the stock, which would be a transfer to them, although the voting trustees were holding it in trust for them in a rep-[172] resentative capacity. The original issued tax was all the tax that could be upon the original issue.

Q. I know, Mr. Griffith, but you understand that the tax has been paid on the original issue of the full amount of the subscription—I mean the full amount of the capital stock of the plaintiff corporation? A. Yes.

Q. Has there been any—and the taxes also have been paid and which are now in issue on the transfer of those subscribing or being entitled to receive that stock or the transfer of their right to receive that stock? A. No, that isn't exactly right.

Q. You don't understand that that is the question.

A. I understand the question on this $3,100 to be this, that you are contending that we are subject to two tax assessments because the people who held the voting trust certificates, the original holders of voting trust certificates, did not at the time of the original issue of the capital stock of the corporation receive shares of the capital stock of the corporation, but received instead thereof a right to receive those original shares if and when the termination

(Testimony of Franklin T. Griffith.)
of the voting trust arrived. My contention is that the trustee is holding the stock as trustee and representative of the stockholders.

Q. Now Mr. Griffith, if the subscribers for the stock had received a certificate of the stock— [173]

A. The subscribers——

Q. —then you understand there would be an issuance tax due?

A. Yes, an issuance tax on the stock——

Q. Now, if instead of receiving that stock they authorized it to be made out to Richard Roe——

A. That is just your point, Mr. Winter, they didn't authorize anything of the kind. They purchased voting trust certificates, and that is all they received.

Q. Let me finish my question. I say, supposing they had authorized it to be issued to Richard Roe. Then do you understand there would still be only one tax due?

A. I don't think that is the question in controversy here.

Q. I didn't ask you that. I asked you if you understood whether there would be just one tax due.

A. I don't think that is material, Mr. Winter.

Mr. Phillips: That is a matter that is not within the issues here. It is drawing some kind of a hypothesis outside of what we have in issue here. I don't think it is proper.

The Court: Well, if Mr. Winter feels it is material and wishes to——

(Testimony of Franklin T. Griffith.)

Mr. Winter: No, your Honor, it is one of the things this Court has to decide. What I am trying to clear up is that the witness is trying to state what the government's position is here, when it is in error.

The Court: I will have to make the finding. You are about [174] to wind up, are you?

Mr. Winter: No, your Honor, I am afraid we will have to call a witness here on some matters, and I think we had better adjourn.

The Court: Are you going to call another witness who is not in the court room?

Mr. Winter: No, he is in the court room.

The Court: Let's go on and finish, unless you are all worn out.

Mr. Winter: It might be rather lengthy.

The Court: We can do it in a half hour, can't we?

Mr. Winter: I think so.

The Witness: Are you through with me?

Mr. Phillips: That is all.

(Witness excused.)

Mr. Phillips: I think we can stipulate on the regulations. Under the regulations original issues of voting trust certificates are not taxable. Regulation 71—unfortunately, I don't have a '26 print, but I have a '32 print. It might be confusing. I understand Mr. Winter——

Mr. Winter: We can stipulate that there are regulations and which have the force and effect of law, unless otherwise authorized, and I have—one of my associates have scoured the country to get a regulation which was in effect at the time [175] this controversy arose, which is Regulation 71 in the 1926 print, and counsel and I have stipulated that it may be made a part of the record in this case and furnished to his Honor in deciding the case.

Mr. Phillips: That is quite agreeable. I tried to get a '26 print in Washington, and they apparently were all out of them. The plaintiff rests.

Mr. Winter: Now, if the Court please, in behalf of the defendant we will offer in evidence a certified copy of the Assessment Certificate and that portion of the October, 1933, Miscellaneous Tax Assessment List—Oregon collection district—showing an assessment of $9,772.29 documentary stamp tax, against Portland Associates, Inc., Portland, Oregon. A certified copy, certified by the Secretary of the Treasury.

Mr. Phillips: We would like to interpose our objection to this on the ground it is incompetent, irrelevant and immaterial, and it is not within the issues of the case, and the fact that the assessment was made has been alleged in the answer and admitted again in the reply.

The Court: Admitted subject to the objection.

(Certified copy of Assessment Certificate so offered and received was marked received as Defendant's Exhibit 19.)

Mr. Winter: We will offer in evidence a certified copy of the Assessment Certificate and that portion of the November, [176] 1933 Miscellaneous Tax Assessment List—Oregon collection district—showing an assessment of $205.60 documentary stamp tax, against Portland Associates, Inc., c/o Title and Trust Company, Depositary, Portland, Oregon.

The Court: The same objection, Mr. Phillips?

Mr. Phillips: The same objection, your Honor.

The Court: Same ruling.

(The certified copy of Assessment Certificate so offered and received, was marked received as Defendant's Exhibit No. 18.)

Mr. Winter: And a certified copy of that portion of the November, 1935, Miscellaneous Tax Assessment List—Oregon collection district—showing assessment of five per cent penalties in the amounts of $488.61 and $10.28 and interest in the amounts of $1,942.73 and $43.89, against Portland Associates, Incorporated, c/o Portland Title Trust Company, Portland, Oregon.

Mr. Phillips: Same objection, your Honor.

The Court: Same ruling.

(The certified copy of Assessment Certificate so offered and received, was marked received as Defendant's Exhibit No. 17.)

Mr. Winter: A certified copy of the Assessment List, Oregon collection district——

The Court: How many of those do you have? [177]

Mr. Winter: I have two more, your Honor.

The Court: All right.

Mr. Winter: I don't need to read them into the record; I offer them.

Mr. Phillips: And we will offer the same objection, your Honor.

The Court: Just a word or two identifying them for the record.

Mr. Winter: Well, that portion of the October, 1935, assessment list for $2,800.00, and that portion of the February, 1937, Miscellaneous Tax Assessment List of $175.81.

Mr. Phillips: Just a minute. May I examine those? You say a portion of it?

Mr. Winter: Yes, it is only the portion that pertains to this taxpayer. We wouldn't want to have the list—you see what they do, you see, it just shows the—I might say that the assessments have been admitted but not in the form which they allege, and there might be some controversy as to just what assessments and the dates——

The Court: Well, these are Defendant's Exhibits blank and blank, the number to be supplied by the reporter, to which Mr. Phillips is making the same objection as before?

Mr. Phillips: The same objection.

The Court: And I will admit them with the same ruling.

(The certified copies of Assessment Certificates so offered and received, were marked received as Defendant's Exhibits Nos. 15 and 16, respectively.) [178]

Mr. Winter: We will offer in evidence a certified true copy of the Claim for Refund of $10,298.18 documentary stamp tax, with statement, analysis and schedules attached, filed by Portland Associates, Incorporated, a corporation of Oregon, Portland, Oregon. It is plaintiff's claim for refund upon which he bases his suit and which is the only basis for this action.

Mr. Phillips: The same objection, your Honor, on the grounds it is incompetent, irrelevant and immaterial, and it is not in issue in the case because it is admitted in the answer and admitted in the reply as to their affirmative allegations on the same matter.

The Court: Admitted subject to the objection.

(The certified copy of Claim for Refund so offered and received, was marked received as Defendant's Exhibit No. 11.)

Mr. Winter: I offer in evidence a certified copy of the Notice of Adjustment, the claim for refund of documentary stamp tax claimed of $10,298.18; allowed, $2,950.90; and rejected, $7,347.28, signed by D. S. Bliss, Deputy Commissioner, in re: Portland Associates, Inc., Portland, Oregon.

Mr. Phillips: And we make the same objection to this, your Honor, on the same ground, and upon the additional ground that it contains conclusions of the Commissioner.

The Court: Admitted subject to the objection.

(The certified copy of the Notice of Adjustment of [179] Claim for Refund so offered and received, was marked received as Defendant's Exhibit No. 12.)

Mr. Winter: If the Court please, it shows only the basis upon which this tax is made, and it will be very helpful. A certified copy of the letter of February 18, 1937, minus notice of adjustment of the allowance and rejection of the claim.

Mr. Phillips: Same objection to the last one, your Honor.

The Court: Same ruling.

(The certified copy of letter dated February 18, 1937, so offered and received, was marked received as Defendant's Exhibit No. 13.)

Mr. Winter: And a certified copy of the Claim for Refund totaling $2,975.81, documentary stamp taxes filed by the Portland Associates, Inc., a corporation, a copy of a letter rejecting the claim.

Mr. Phillips: Same objection, your Honor.

The Court: Same ruling.

(Certified copy of Claim for Refund, so offered and received, was marked received as Defendant's Exhibit No. 14.)

Mr. Winter: Call Mr. Canneddy.

R. C. CANNEDDY

was thereupon produced as a witness in behalf of the defendant and, after having been first duly sworn, was examined and testified as follows: [180]

Direct Examination by Mr. Winter:

The Clerk: Your name?

A. R. C. Canneddy, C-a-n-n-e-d-d-y.

Mr. Winter: State your name, please.

A. R. C. Canneddy.

Q. And what is your business, Mr. Canneddy?

A. I am an internal revenue agent.

Q. Where is your residence?

A. Los Angeles, California.

Q. Calling your attention to the matter here in controversy, the Portland Associates, did you have occasion to examine the books and records of the plaintiff corporation in connection and also the records of the depositary in connection with the claim for refund filed by the plaintiff corporation?

A. I examined the book of minutes, the resolutions of the corporation, the stock certificate books and the voting stock certificate books in the office of the Title and Trust Company.

Q. Yes. Will you just state to the Court the basis of the tax which was assessed which is shown as Item No. 5 in Plaintiff's claim attached to its complaint.

A. That is the item of $3,100.

Mr. Phillips: Just a moment. If the Court please, we would like to object to this as incompetent, ir-

(Testimony of R. C. Canneddy.)

relevant and immaterial, and asking for the conclusion of the witness. The facts are [181] all in evidence that Mr. Canneddy examined, he says, and the facts speak for themselves. It is merely an application of the law to it.

The Court: Admitted subject to the objection.

A. (Continuing) That is the item of $3,100 involving 155,000 shares of no par value. This tax is a tax on the transfer of the right of certain subscribers or purchasers of such shares, the transfer of those persons' rights to receive the shares, due to having the stock certificate representing such shares issued in the names of the voting trustees.

Mr. Winter: Q. Now, from your examination of the records what was the basis of your statement that that tax accrued, upon what records did you base your examination?

A. It was found that the corporation received a certain consideration in payment for these shares and that per agreement between those persons and the corporation, together with the voting trustees, certificates representing the stock were issued to the voting trustees rather than going through the mechanics of first issuing a certificate in the names of the purchasers or subscribers and then transferring from those names to the voting trustees.

Mr. Phillips: Just a moment. May I ask, you mentioned the agreement, is that a written agreement?

(Testimony of R. C. Canneddy.)

A. The voting trust agreement is the only written agreement that I recall. [182]

Mr. Phillips: Well, I object, your Honor, to this testimony and move to strike the same on the ground it is incompetent, irelevant and immaterial. If he has some agreement in mind, the agreement speaks for itself and is the best evidence. Otherwise as to any agreement between the parties, why he is not competent to testify as to any agreements made unless she was present at the time of the making of any agreements if they are oral.

The Court: I reserve decision.

Mr. Winter: Q. When you say an agreement you are referring to the trust agreement, are you, the trust agreement provided that the stock was not to be issued to them but was to be issued to the voting trustees?

A. Meaning to include the voting trust agreement, but also an apparent agreement between those subscribers or purchasers of the shares, between those persons and the corporation, the corporation not being a party to the voting trust agreement.

Q. Did you find any certificates issued to the subscribers or purchasers or those who paid money for the interest in the plaintiff corporation to the extent of 155,000 shares? A. No.

Q. Were any certificates—did you find any certificates issued to those various people?

A. I found no certificates of stock issued to the purchasers of these particular 155,000 shares.

(Testimony of R. C. Canneddy.)

Q. Well, to whom was the stock certificates themselves issued? [183]

A. The one and only certificate representing that particular block of 155,000 shares was issued in the names of the trustees under that voting trust agreement.

Q. And what certificate was that?

A. Certificate No. 7, I think it is.

Q. Yes, and what else did that include, if you know, besides the 155,000?

A. Well, that certificate was for a total of 505,000 shares, which included the 350,000 shares previously subscribed, which was issued first by Certificate No. 1 in the name of C. R. Griffith and transferred by him to these voting trustees as represented then by Certificate No. 6. It followed then that that certificate No. 6 was surrendered for cancellation and No. 7 issued in lieu thereof to the extent of the original 349,995 shares. So in the final picture of the certificate No. 7 for 505,000 shares, it included the original 350,000 shares and the 155,000 new additional shares.

Q. Now, in the plaintiff's complaint, attached to Exhibit A is item 5 which the plaintiff has designated—no, item 8, which is designated "Transfers, C. R. Griffith to treasury, 249,996 shares; tax assessed and paid, $50.00". Could you state to the Court just what that tax represents?

A. Yes. At the time C. R. Griffith subscribed for the 349,996 shares it was made a part of his

(Testimony of R. C. Canneddy.)
subscription agreement, or offer to subscribe, we preferably call it that, it was made a [184] part of that instrument that if the corporation would accept his subscription he would donate back to the corporation 249,996 shares, and in accordance with the terms of that offer or subscription——

Mr. Phillips: The same objection to what follows, your Honor, as I made before.

The Court: The same ruling.

A. (Continuing) —in accordance with the terms of that offer or subscription, 249,996 shares were donated to the corporation, and this tax of $50.00 represents the tax on that transfer of ownership from the subscriber, C. R. Griffith, to Portland Associates, Incorporated.

Mr. Winter: Q. Well, what actually happened with respect to the certificates of that 249,000? I mean what certificates were issued with respect to that?

A. Well, notwithstanding the terms of the offer, stock certificate No. 1 was issued by the corporation representing 349,996 shares, was issued to C. R. Griffith.

Q. Yes.

A. It then followed that subsequently, I haven't the dates here, but some weeks later C. R. Griffith assigned and transferred that particular certificate representing the 349,996 shares to——

Q. In what record does that appear?

A. On the certificate itself.

(Testimony of R. C. Canneddy.)

Q. That is on Certificate No. 1? [185]

A. Yes. And embodied in the endorsement or written in the endorsement or assignment is the names of the trustees to whom C. R. Griffith assigned and transferred those shares.

Mr. Phillips: We object to that. It shows on the record, your Honor.

Mr. Winter: Q. Now Mr. Canneddy, do you have anything further to say about that assessment?

A. I believe not.

Q. Now, with respect to items 10 and 11 shown on Plaintiff's Exhibit A to its complaint, is titled "E. M. Steell to Title and Trust Company, et al.; Trans. 2,500 shares, $50"—no, that is "Ten". That has been refunded, hasn't it?

A. Yes, and 11 also.

Q. And 11 also. Now, with respect to items 12 and 13 appearing on Exhibit A, designated by the plaintiff as "Right to receive"—no, designated by the plaintiff as "Transfer as of June 30, 1932, 7,000 shares, $140", that is item 12; and item 13 is, "Transfer subsequent to June 21st, 1932, 3,000 shares". Was there any reason for separating those items other than because of the change in the tax rate? A. No.

Q. To just what does that tax—no. And further it appears that, "Refund allowed and paid of $60.00 on item 13". Can you explain to the Court the basis of that assessment? A. Yes. It was—— [186]

Mr. Phillips: The same objection, your Honor.

(Testimony of R. C. Canneddy.)

The Court: Same ruling.

A. (Continuing) Examination of the records previously referred to showed that voting trust certificates issued representing the 3,000 shares specified in item 13——

Mr. Winter: Q. Just a minute. Could you take those records if time permitted and show the Court each individual certificate and show them and draw them down, or is the——

A. No, as I recall it the particular voting trust certificates are not identified with this particular item. The reason for that, at the time this report was first made the voting trust certificates had not been issued. The deputy collectors conducting the investigation at that time were in the office, as I understand it, of the Title and Trust Company making the investigation on about June the 20th, 1932. While they were there two letters of instruction came in to the Title and Trust Company instructing, that is, they were letters signed by Franklin T. or F. T. Griffith directing the issuance of the voting trust certificates in these amounts.

Q. Those were the letters referred to by the plaintiff?

A. Yes, letters of instruction. Well, those letters came in, one of them while the boys were working there on June 20th, so they computed the tax at the rate then in effect. Then on the following day, June the 21st, when the higher rate of tax became effective, the second letter came in covering the 3,000

(Testimony of R. C. Canneddy.)

[187]shares, so they computed the tax at the four-cent rate.

Q. That was the tax based on the certificates issued to others than——

A. Well, not exactly on the certificates. It was based on the transfer of the right of the depositor of the shares—the transfer of the right of the person who had deposited the shares in the Trust—

Mr. Phillips: I object to this testimony and move to strike it, your Honor, also, on the further ground that he was not present at that time. He is testifying to something that he knows nothing about except by hearsay.

The Court: Decision reserved.

A. (Continuing) The report indicates clearly what the tax is based on. That is, the transfer of the depositor's right to receive voting trust certificates representing those shares.

Mr. Winter: Q. By that you have reference to the government's exhibit of the notice of adjustment and claim for refund? A. Yes.

Q. Is that also true of exhibit—I mean of item 13? A. 12 and 13.

Q. 12 and 13. Now with respect to item 14, Mr. Canneddy, which is shown as "Trust Certificates one to one hundred and fifty, $1.00 par certificates," and, "150 to 398 no par". $5,134.55, tax assessed and paid. Correct tax claimed by taxpayer, the [188] plaintiff, $1,275.64, and $1,450.00 refunded. Can you state to the Court just what sum the amount—the

(Testimony of R. C. Canneddy.)
claim was rejected as respect to this item? It would be the difference between $1,450 plus $1,275 and $5,134.55, or $2,408.91, is that correct?

A. Yes, that is the amount.

Q. And what is the basis for that tax liability in that, if you know? A. The basis of tax——

Mr. Phillips: The same objection, your Honor.

The Court: Overruled.

A. (Continuing) —is the same as covering items 12 and 13. The issuance of voting trust certificates to persons different than those who deposited the shares in the voting trust. It would constitute—or, the basis of the tax is that the depositors of the shares in trust transferred their rights to receive those voting trust certificates.

Mr. Winter: Q. Now with respect to item No. 15, which is trust certificate 406 to 417; see schedules hereto attached; that is referred to in plaintiff's complaint, Exhibit A.

A. That is certificates 409 to 17, isn't it?

Q. Well, it is 404 in the complaint. You say it should have been from 409 to 417, inclusive?

A. Well, according to this data I have.

Q. Yes. Now, just what does that tax—what is the amount of [189] the tax liability involved in that issue?

A. The amount in issue in this case?

Q. Yes. A. Is $65.60.

Q. What is the amount of tax originally assessed? A. $205.60.

(Testimony of R. C. Canneddy.)

Q. Had there been any payments prior to that time? I notice the plaintiff says the stamps were purchased. Is that what your findings disclosed, of a hundred and——

A. There were stamps purchased in the amount of $106 covering part of the tax. The total amount of tax involved under those several certificates numbered was $311.60.

Q. Of which $140.00 apparently has been admitted by the plaintiff?

A. Yes, and paid, and then in addition to that the plaintiff purchased stamps in the amount of $106.00 and affixed them.

Q. Against which certificates was that, if you know? A. I am not able to say.

Q. Now, what is the basis of that tax, Mr.——

A. There is two different classes of tax involved here. Certificate No. 409 I am not able to say here, I don't believe. I don't believe I can explain the particular one, certificate 409, that involves $28.00, but certificate No. 10—or 410, rather, is apparently a transfer of 3,500 shares represented by a voting trust certificate previously issued. [190]

Q. Previously issued?

A. We could probably by referring to the voting trust certificate book, the stub of No. 410, determine just which——

Q. Well, that has been admitted. Now——

A. Well, then certificates No. 411 to 416, inclusive, was the issuance of voting trust certificates

(Testimony of R. C. Canneddy.)

termed as original issue of voting trust certificates, but there again the tax computed at the two-cent rate is a tax on the transfer of depositor's rights to receive those voting trust certificates due to having them issued in the names of other persons.

Q. If voting trust certificates were taxable at original issue the tax would be either five—one or five cents, it would not be two cents? A. Yes.

Q. These were on the transfer of the right to receive the two-cent rate? A. Yes.

Q. Although it was the first time the original certificate was issued they were not issued to those who had the beneficial interest or who had deposited the stock with the trustee, is that true?

A. That is right. The department recognizes or contends for no tax on the issue of voting trust certificates.

Q. Now, with respect to the tax covered by the plaintiff's supplemental complaint, what was the basis of the $1,400—the [191] first item of $1,400 set forth in the plaintiff's claim for refund?

Mr. Phillips: The same objection, your Honor.

The Court: Same ruling.

Mr. Winter: Q. I have reference to those options, Mr. Canneddy.

A. Oh, yes, I recall. I was trying to find it here in the notes. The first item of $1,400 is a tax at the rate of four cents per share on the issuance of the options by Portland Associates, Incorporated, to those three parties named.

(Testimony of R. C. Canneddy.)

Q. You made the original investigation of that tax liability, did you? A. Yes.

Q. And what date did you find as the date of the meeting of the board granting the options which have been introduced in evidence? Was it July 31st, 1932?

A. Yes, the date that we found and embodied in our report, or I will say that I found and incorporated in the report, was shown as the resolution in meeting July 31st, 1932.

Q. Since then have you made another investigation? A. Yes.

Q. And what date did you find the meeting was held which has been introduced in evidence?

A. Oh, this morning I re-examined the minute book here in evidence and find that there is no resolution in there or meeting of [192] July 31st, 1932, but that the meeting or adjourned meeting of January 27th, 1932, covers the items.

Q. Which if correct would carry a rate of two cents rather than the four cents?

A. Yes, apparently.

Q. Then if this date is correct, January 27th, 1932, it would carry a two-cent rate of $700 liability instead of the $1,400? A. That is right.

Q. Yes. Now, with respect to the second item?

A. The second item, as I recall it, is——

Mr. Phillips: The same objection, your Honor.

The Court: Same ruling.

Mr. Phillips: This is hearsay testimony.

(Testimony of R. C. Canneddy.)

A. (Continuing) Paul Stock was the owner and holder of voting trust certificates for 35,000 shares, which voting trust certificates he assigned and delivered to the Portland Associates, Incorporated, on or about—the exact date I don't know. I believe early in 1935, is the best I can say; that he assigned those voting trust certificates representing 35,000 shares of stock to Portland Associates, Incorporated, in consideration of that corporation delivering to him a certain oil-gas lease.

Mr. Winter: Q. Then I understand this is a tax of four cents per share on the transfer of voting trust certificates in the amount of—representing 35,000 shares of plaintiff corporation stock? [193]

A. Yes, the assignment by Paul Stock to the Portland Associates.

Mr. Winter: I think that is all, your Honor.

Cross Examination by Mr. Phillips:

Q. Well, Mr. Canneddy, in regard to an agreement in the first part of your testimony, you said there was some apparent agreement. Do you know of any agreement between the persons who received voting trust certificates and the corporation as such?

A. Only by deduction, I should say.

Q. That is the only thing that you base it on?

A. Yes, I think that is true.

Q. You know of no such agreement between the corporation itself and persons who received voting trust certificates?

A. No, I know of no written agreement.

(Testimony of R. C. Canneddy.)

Q. No. Now, you also stated in your testimony that the people who purchased these voting trust certificates actually purchased stock and agreed to deposit it under the terms of the voting trust agreement?

A. I didn't say that anybody purchased voting trust certificates.

Q. Well, all right. You said in your testimony then that the purchasers of stock bought the stock and agreed to deposit it under the voting trust agreement. Now, did you find any such agreement?

A. Only the voting trust agreement. [194]

Q. Only the voting trust agreement. Did you find where any certificates of stock had been issued by the corporation to the same persons who received voting trust certificates?

A. I would like to qualify that answer there just a little, that the only other agreement between the purchasers of stock and the corporation in addition to the voting trust agreement that I recall would be the subscription agreement involving the original 350,00 shares. It was there stated that the purchaser of the shares would purchase them pursuant to the voting trust agreement, or words to that effect.

Q. The original subscription?

A. Yes, for the original 350,000 shares.

Q. That is the subscription in the minute book?

A. Yes.

Q. If you are erroneous about those words that you have just used, why the Court should take the

(Testimony of R. C. Canneddy.)

minute book, of course? A. Yes, of course.

Q. Did you find any place where there had been any stock issued by the corporation, though, to these people who were listed as voting trust certificate owners in these schedules?

A. Well, of course going back to the first, the first stock certificate issued was for the 349,000 odd shares issued to C. R. Griffith not as a trustee.

Q. You say that was transferred to the corporation?

A. Yes—no, not transferred to the corporation. It was trans- [195] ferred to the trustees.

Q. That is what I thought. That is certificate No. 1, transferred to the voting trustees?

A. Yes.

Q. That is what actually happened to it, isn't it? A. Yes, that is as I recall it.

Q. And that is the tax that is listed as No. 2 on this item here. A. Yes, item No. 2.

Q. Yes. A. $70.00.

Q. You never found any certificate issued to the corporation as such, did you?

A. You mean covering that donated stock?

Q. For the 249,000? A. No.

Q. There was no certificate, so far as you know, ever issued? A. No, not that I have seen.

Q. Now, on the 155,000 shares, item No. 5 that you referred to on your list, did you find any of that stock that was issued as capital stock by the corporation to the owners of the voting trust certi-

(Testimony of R. C. Canneddy.)
ficates shown in the voting trust certificate books?

A. The only stock certificates that I saw issued by the corporation representing those shares was that certificate No. 7 for 505,000 shares.

Q. 505,000 shares. That was issued to the voting trustees? [196] A. Yes.

Q. You never found any issued to any of these same individuals listed as voting trust certificate holders in the voting trust books?

A. No, outside of possibly those qualifying directors' shares.

Q. Qualifying directors' shares excepted. Now, your testimony so far in explaining your tax of $3,100 there is based upon the assumption, is it not, that stockholders came in and subscribed for shares of stock and transferred their right to the voting trustees, isn't that what you are basing it on?

Mr. Winter: You mean actual subscriptions, Mr. Phillips, or implied subscriptions?

Mr. Phillips: Q. Well, you are assuming that they bought stock from the corporation first, aren't you?

A. My understanding is that the corporation sold or issued its shares to whoever paid for them.

Q. Well, did you find any such shares issued?

A. I will say I found no certificates issued, but shares.

Q. No certificates issued?

A. But shares were bought. The issuance of

(Testimony of R. C. Canneddy.)
shares is taxable even though no certificates may be issued.

Q. Well, who do you tax?

A. Well, the law imposes the tax liability equally on at least two parties.

Q. The purchaser and the seller? [197]

A. Yes, or the issuer.

Q. If there is something issued?

A. Yes. Well, the shares, if they are bought and paid for and the consideration accepted by the corporation in payment for those shares, would, for purpose of this tax, be held to be an issue of shares.

Q. But the issuer of certificates or shares of any kind is the only one who is taxable, is he not, as far as the issuance goes? A. No.

Q. And that is only when his records shows the issuances?

A. No, the issuer or the person to whom issued would be liable for the tax under the Revenue Laws.

Mr. Winter: Of course, that is a matter for the Court to determine, who is liable; it is a question of liability here. We just put in the basis—all I expected to show by this witness is the basis for the assessment, and I think it has been very well done. Of course, I have no objection to going on if he wants to.

The Witness: Well, Section 801 of the Revenue Act of 1926 will clearly show the Court that the tax liability is squarely on the shoulders of either party or both parties.

(Testimony of R. C. Canneddy.)

Mr. Phillips: Q. Yes. It is on the shoulders of a corporation if the corporation issues the stock?

A. Yes.

Q. Yes, and only for the stock that it issues?

[198]

A. Stock is a rather broad term; if I might suggest that we distinguish between shares and certificates, just to clear the points in here.

Q. Well, you say the corporation was not a party to the voting trust here?

A. As I understand, it is not.

Q. No. Now, as to your investigations down at the Title and Trust Company. You didn't make those on the 20th of June, did you, or the 21st, 1932?

A. No.

Q. Who did that?

A. As I recall, it was Deputy Collectors Gingrich and Courtright.

Q. Mr. Oscar Gingrich, is that his name?

A. Yes.

Q. You were not present?

A. I am not certain as to the other deputy being Courtright, but I believe it was.

Q. It was Mr. Courtright, wasn't it?

A. I think so.

Q. Where is Mr. Gingrich these days, do you know?

A. He passed away some year ago or more.

Q. Oh, did he? And Mr. Courtright, where is he?

A. I don't know about Mr. Courtright.

(Testimony of R. C. Canneddy.)

Mr. Winter: He has been out of the service for some time. A. Yes. [199]

Mr. Phillips: Q. The information that you have was received after the claim for refund, is that correct?

A. Yes. I came into the matter as a result of the claim for refund having been filed.

Q. Do you have the report that Mr. Gingrich made in this matter?

A. I was going to say that that is in evidence here, is it not, Mr.——

Mr. Winter: We have what purports to be a copy of it. The Commissioner didn't send it in. I don't know whether it is a copy or not, I couldn't swear that it is a copy because I don't know Mr. What's-his-name's signature.

Mr. Phillips: Gingrich's report was not among that that you put in, as I recall it.

Mr. Winter: Of course, his report would be an inter-office report to the Collector. No, it has not been introduced in evidence. I have a part of the Collector's files which he says is a part of the file. Now, I assume that it was the Deputy Collector's report, but we do have in evidence the Commissioner's determination and notice of adjustment where he goes in and shows the basis of each one, and that is in evidence, showing just exactly what the Commissioner bases his assessment on.

Mr. Phillips: Q. Let me ask another question. The Commissioner in making his assessment, you

(Testimony of R. C. Canneddy.)
are familiar with the Commissioner's procedure in making the assessment? A. Well—— [200]

Q. He bases that assessment upon his reports that come from the field men, doesn't he?

A. Not entirely. He takes the information that the field man sends in and will frequently see the necessity of calling for additional information in determining the tax liability.

Q. But in this case you were not called in until after the claim for refund?

A. That is right.

Q. Was filed. So that in the original instance and before the assessment was made by the Commissioner, he only had the field agent's report, isn't that true?

A. I don't know about that for sure. I wouldn't know.

Q. You wouldn't know? A. No.

Q. Well, do you know of anything else that he would have besides the field agent's report?

A. Well, I might theorize as to things that may have developed, but I don't know. The Commissioner's office will in some cases correspond with the taxpayer and request additional information. In some cases it is referred to the Collector's office and some other deputy will be sent out to make a reinvestigation and submit additional data, but whether any of that was done, I am not in a position to say.

(Testimony of R. C. Canneddy.)

Mr. Phillips: Do you have the report of the field agent available? [201]

Mr. Winter: No. I say I have a copy of the Collector's file, which is here, but——

Mr. Phillips: Does that contain Gingrich's report?

Mr. Winter: Well, it contains what purports to be a copy of Mr. Gingrich's report, yes.

Mr. Phillips: Well, if the Court please, we will file at this time our notice to produce, which was served about a week ago, and this item was listed among that, and we would request the right to put in a copy in lieu of the original which is in Washington, apparently.

Mr. Winter: If you've got a copy, produce it.

Mr. Phillips: May I have your copy?

Mr. Winter: I don't know that it is a copy.

Mr. Phillips: Well, may we see it?

The Court: Is this a copy here you have just given the bailiff?

Mr. Phillips: No, that is my original notice which was served. I will file that.

The Witness: I think this is what you refer to, Mr. Winter. It is tied in to this file with a lot of other papers, communications, inter-office communications, some of them. We might take this file apart and take out that one, I suppose.

Mr. Winter: It isn't my file, but if the Court wants it I will certainly——

The Court: All right, put it in. [202]

(Testimony of R. C. Canneddy.)

Mr. Winter: I will say this, that the Court will assume the responsibility. Now, whether that is his final report or not I don't know, I just got that much of the file and I sent to Washington for all the files they had in Washington, and I brought all the certified copies, and counsel's demand was so indefinite, he didn't say what he wanted, so I got everything I could and then he objected to introducing them after I got them here.

The Court: Well, are you going to examine him on that, Mr. Phillips?

Mr. Phillips: Well, I never examined it thoroughly, except I know what is in it pretty well from conversations with Mr. Gingrich.

The Court: Are you going to examine this witness on it, I mean.

Mr. Phillips: Well, we will just put that in evidence.

Mr. Winter: Certainly we are going to object to its introduction because Mr. Gingrich is now dead and this is an inter-office communication. I think that the Commissioner's assessment showing his basis is what counsel—now, it does not appear that this has ever been communicated in substance to the Commissioner, and I have no objection if the Court wants it, I certainly——

Mr. Phillips: I will offer it in evidence.

Mr. Winter: Well, we will object to the introduction of it [203] for the purpose of the record; under the authorities the reports of the agents is

(Testimony of R. C. Canneddy.)

not evidence, particularly when it appears that the Commissioner—if he has made it on a different basis. Now, I know what counsel is going to refer to in there. The agent made in this report, made a reference to what he called a tax on an original issue, but it is explained by the Commissioner in his report and shows the basis, and we will object to it as it is not the best evidence, it appears to be a document written by a man dead and which no right of cross examination exists, and it does not appear to have been made by the Commissioner or to have been used by him in the assessment which is admitted in evidence.

The Court: Admitted subject to the objection.

Mr. Winter: Note an exception.

The Court: Allowed.

(The report of Investigating Officers Gingrich and Courtright so offered and received, was marked received as PLAINTIFF'S EXHIBIT No. 20.)

The Witness: Mr. Phillips, I find here a copy of the later one of that $209.00 item that isn't included in that. Do you want a copy of that also?

Mr. Phillips: Q. No, I don't think so. That is a very small item. But on that particular item of $205.00, I might ask you about that. You testified about certificate No. 409 for instance, upon which a tax of $209.00 was assessed. [204]

A. Yes. I said I was not able to say other than just that he computed the tax at a four-cent rate,

(Testimony of R. C. Canneddy.)

that it must have been in his report as a transfer.

Q. If there was no transfer as shown by the certificate book, why there wouldn't be any tax due, would there?

A. You mean by the voting trust certificate book?

Q. The voting trust certificate book.

A. Well, the same amount of tax would be due if it was one of them that he dubbed "Original issue."

Q. Well, I mean if that was issued just to correct an error in the certificate issued to the same person no tax is due on it, is there?

A. If I understand you right, if certificate No. 409 was issued in the name of a person in lieu of the certificate representing that number of shares previously issued in the same name merely to correct an error, that would involve no tax, that is right.

Q. Now, these others you testified to, like 411 to 416, inclusive, issued to C. H. Griffith listed on the list as original issue, now you say that tax represents the depositing of that with the voting trustee?

A. No, that is one of those things for you and I to use the same words and get the same understanding, but certificates No. 411 to 416, identified in this schedule of yours, Mr. Phillips, as original issue, means an original issue of voting trust certificates. [205]

(Testimony of R. C. Canneddy.)

Q. Yes, that is as distinguished from a transfer?

A. No. It would distinguish it to this extent, that it does not represent other voting trust certificates which have been surrendered for cancellation.

Q. Yes. Well now, what did you say the transfer is there that you tax?

A. It is a transfer of the depositor's right to receive these voting trust certificates.

Q. The depositor's right to receive the voting trust certificates, all right. Now, isn't that included in the original tax on the 155,000?

A. No. If I may draw an illustration of the transaction, possibly—I have tried to do this before, but you will possibly see it. It is that if I have subscribed or purchased from the corporation a hundred shares of stock and pursuant to the voting trust agreement allow a certificate representing those shares to be issued to the voting trustees, two taxes have been incurred. First would be what we call the original issue tax pursuant to my subscription for those shares. The second would be a transfer tax based on the transfer of my right to receive the shares due to the issuance of a certificate in the trustee's name. Now, my being the depositor of those shares in the voting trust, I become entitled to receive voting trust certificates representing those shares, according to the terms of the voting trust agreement. So then the third tax [206] arises by virtue of my directing that voting trust certificates

(Testimony of R. C. Canneddy.)

representing that hundred shares be issued to Smith. There I have transferred my right to receive the voting trust certificates.

Q. All right. Well, in this case did you find any evidence in the books of the voting trust certificate books or in the stock books of the corporation that any such certificate had been issued to C. H. Griffith by the corporation in the first place, a certificate for a share of stock issued by Portland Associates?

A. Well, I don't recall of a certificate of stock being issued to C. H. Griffith unless it would be one of those qualifying director's shares.

Q. Well, nothing representing the amount set forth in this item 410 to 416, is there?

A. No.

Q. No. A. These refer not to——

Q. And did you find any evidence any place in the record where C. H. Griffith had deposited any certificates with the voting trustees to represent these same shares even?

A. No, we did not. That is what raised the question of this what you might term the third tax. C. H. Griffith receives voting trust certificates representing shares that he apparently did not subscribe for.

Q. Your tax then is based on the assumption that he was subscrib- [207] ing for that many shares and having them issued in his name and then depositing them in the trust?

(Testimony of R. C. Canneddy.)

Mr. Winter: Now, just a minute. Your Honor, I submit the witness didn't say that. That is trying to becloud the issue here.

The Court: Well, he can make his own answer, Mr. Winter.

A. This tax is based on the apparent——

Mr. Phillips: Q. Just answer my question, please. Isn't it based on that assumption, that that is——

Mr. Winter: I submit the witness can answer it the best way he knows how.

The Witness: Will you have the reporter read the question again?

(The reporter thereupon read the question.)

A. No, that isn't the way, Mr. Phillips. It is apparently a case of Mr. Griffith not being a depositor of shares in the trust.

Mr. Phillips: Q. Well, let's take another one. C. H. Griffith, of course, was one of the original subscribers. Let's take some of these other original issues here as an example. Down at the bottom of page 1 we find L. L. Underdahl, certificates 48 and 49 for 3,000 shares, voting trust certificates. Now, in that particular instance your tax is based on the assumption, is it not, that Mr. Underdahl subscribed for shares of stock in the corporation—had shares of stock issued to [208] him and he turned those shares of stock in to the voting trustees to be held under the voting trust, isn't that right?

(Testimony of R. C. Canneddy.)

A. No, that isn't the way it is set up, Mr. Phillips. It is just the opposite of that, that those people to whom the voting certificates were issued were not the depositors of the shares of stock in the trust.

Q. They were not depositors?

A. Exactly.

Q. That is, that they made no transfer to the voting trustee?

A. That is right. This tax, as in these instances of voting trust certificates 411 to 416, is on the transfer of the depositor's right to receive those shares.

Q. The depositor's right to receive?

A. Yes, that is the right to receive the voting trust certificates for the share. We might just as——

Q. I guess that is a matter of law anyway. Now, on the minutes relative to the options which you referred to, you examined those yourself?

A. Yes.

Q. And you mentioned the difference in the date. Now, would you say that the minutes have been changed or anything of that kind, the date of that meeting, since that time?

A. No, I see no evidence or indication of that.

Q. Don't you think that your date at that time was confused with the expiring date of the option, July 31st? [209]

A. Well, it is hard to admit such a thing, but in the face of it here it must be the case.

(Testimony of R. C. Canneddy.)

Mr. Winter: That is what we intend to concede. That is the reason I got that of my own volition. I asked that question. I didn't want any inferences, that is the reason I put it in there, to show that we made an error.

Mr. Phillips: Q. Now, as to the transfer of Mr. Stock that you referred to. Did you find any evidence of a transfer of Mr. Stock to the corporation?

A. As I remember it, the stock certificates were endorsed by Mr. Stock and delivered to the corporation—I mean the voting trust certificates.

Q. The voting trust certificates? A. Yes.

Q. You don't know who they were delivered to?

A. Well, no. As I remember it, we haven't talked about that since, I mean you and I haven't discussed that. It is two years or more ago, but as I recall it the voting trust certificates were in the possession of Portland Associates, Incorporated. It was contended by officers of the corporation that they were so accepted, but contended that no tax attached because the corporation considered them to be canceled upon the return by Mr. Stock.

Q. Well, you were told at that time that they were submitted for cancellation, weren't you? [210]

A. Well, I may have been. I just don't remember. I probably was. I may have mentioned that in my report. Let me see if I did (searching papers). I don't see that thing here now.

(Testimony of R. C. Canneddy.)

Q. Well, we will pass that, then. You didn't find any evidence that any money had been paid on these options? A. No.

Q. Or that they had ever been accepted by the parties named in those resolutions?

A. I wouldn't be able to say and wouldn't be concerned with whether they were accepted by them. As I understand it, those persons initiated the matter that developed in the options being issued by the corporation. They made a proposition to the corporation, offering to assume certain liabilities in one case.

Q. But they never exercised the option?

A. Well, I wouldn't know whether they did. They didn't to my knowledge, but that would be immaterial.

Q. They didn't, so far as you know. Well, if they had exercised the option and had certificates issued to them the tax would be on the certificate, wouldn't it?

A. No, the tax would be on the option. If an option is a bona fide option the tax is payable at the time the option is executed, and it is immaterial whether it is ever exercised. If it is eventually exercised and the share is purchased, no additional tax would be payable.

Q. Well, in this case if it had been exercised and the certifi- [211] cates issued, why the tax would be on them because you have taxed every certificate three times already, haven't you?

(Testimony of R. C. Canneddy.)

A. No, this would involve another transaction. One person owning shares of stock may execute any number of options covering those shares of stock and none of the options ever be exercised, the tax would be payable on each option so executed.

Q. But so far as you know they were never exercised in this case? A. No.

Q. No money paid, so far as you know?

A. No.

Q. No certificates received, so far as you know?

A. You mean no certificates——

Q. You never found anything except what is in the minute book there in regard to those options?

A. No, I believe not.

Mr. Phillips: I think that is all.

Redirect Examination by Mr. Winter:

Q. Just one question, Mr. Canneddy. How long have you been in the Internal Revenue service as the agent specializing in tax matters?

A. Since August 16th, 1928.

Q. Has it often occurred in your work, I mean have you often seen certificates issued other than the subscribers? A. It is very common. [212]

Q. Very common, or issued to nominees?

Mr. Phillips: We will object to this line of questioning, your Honor, as to what they have done in other cases. It is not binding upon the Court.

Mr. Winter: The only thing I have in mind——

The Court: How many more questions have you?

(Testimony of R. C. Canneddy.)

Mr. Winter: Just about one more.

The Court: Not more than two.

Mr. Winter: All I wanted to say was that counsel seems to——

The Court: Go ahead, ask your question.

Mr. Winter: Q. Did you answer the question?

A. No, I didn't.

Mr. Winter: (To the reporter) Would you read the question?

(The reporter thereupon read the question.)

A. Oh, I answered that it is very common to issue stock certificates to other persons than the subscriber to the share.

Mr. Winter: Q. As is contended was done in this case? A. Yes.

Mr. Winter: That is all.

Mr. Phillips: That is all.

(Witness excused.)

Mr. Winter: We have no further evidence, your Honor, but before resting we would like to—before presenting the case we would like to file a motion for judgment. [213]

The Court: Reserve decision.

Mr. Winter: And requested findings of fact and conclusions of law.

The Court: Reserve decision.

Mr. Winter: Your Honor will note that in the findings, I just want to call your Honor's atten-

tion to this, in finding No. 18 we have asked the Court to find that the meeting of the board of January 28th, 1938, admitting our—I left that open, and it is written in in ink because it was stated at the four-cent tax instead of the two-cent rate.

Mr. Phillips: If the Court please, there are a couple of minor amendments that we would suggest in the complaint as to amounts on page 3, which——

The Court: Just dictate them to the reporter.

Mr. Phillips: On page 7 of the complaint we would request that it be amended to conform to the proof, that the amount in line 20 of $7,783.19 to be changed to $8,124 51.

Mr. Winter: Where is that?

The Court: He can tell you afterwards. Allowed.

Mr. Phillips: And that the words together with the sum of $64.00 be stricken.

The Court: Allowed.

Mr. Phillips: And that in Paragraph No. 8, line 29, on page 3 of the complaint, that the figures $2,950.00 be changed to $2,950.90. [214]

The Court: Allowed.

Mr. Phillips: They are typographical errors, I think, and our findings of fact, we had anticipated we would submit them after the Court's decision.

The Court: Well, I don't know the practice, that is for you to say. Of course, you are trying your own case, your opponent has just suggested—have you got them prepared?

Mr. Phillips: No, I haven't.

Mr. Winter: Judge, if he refused to make special findings requested after the case had been settled, and——

The Court: Now, you have talked all morning, let me talk now. I suggest that you hold the case *upon* as to your rebuttal, and before you show it closed on the record submit your findings of fact. Do you have any objejction to that?

Mr. Winter: I have no objection to giving counsel that leave.

Mr. Phillips: Under our practice I understand the Court has to make findings without a jury anyway on all the issues.

The Court: Well, now, you do it any way you want to. Do you want to keep your record open or show it closed now?

Mr. Griffith: No. They have stipulated on something.

Mr. Phillips: What about time on briefs, your Honor.

The Court: You take your own time on that.

Mr. Winter: How long do you want?

Mr. Phillips: I can have my brief within two weeks or ten days. [215]

Mr. Winter: May we have thirty days after counsel submits his brief?

The Court: Yes. Court adjourned. [216]

United States of America,
State of Oregon,
County of Multnomah.—ss.

I, George F. Cropp, hereby certify that I am a qualified and experienced stenotype reporter; that I reported in stenotypy the proceedings had and the testimony given in the foregoing entitled cause on Thursday, March 31, 1938; that I subsequently reduced my stenotype notes to typewriting, and that the foregoing and hereto attached 95 pages of typewritten matter, numbered from 1 to 95, inclusive, contains a full, true and accurate record of said proceedings and testimony so taken by me in stenotypy as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 2nd day of July, 1938.

(Signed) GEORGE F. CROPP.

[Endorsed]: Filed Apr. 26, 1939. [217]

[Title of District Court and Cause.]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, the defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit

from the Final Judgment entered in this action on the 7th day of January, 1939.

CARL C. DONAUGH
United States Attorney for
the District of Oregon
M. B. STRAYER
Assistant United States
Attorney
Attorneys for Appellant
506 Federal Court House,
Portland, Oregon

Filed April 6, 1939
G. H. Marsh, Clerk
By F. L. Buck, Chief Deputy. [109]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Defendant, J. W. Maloney, having heretofore filed with the above-entitled court his notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, states that on appeal he intends to rely upon the following points:

(1) Findings of Fact Nos. 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, and 30, made and filed by the above-entitled court, and each thereof, are erroneous and are not supported by and are contrary to the evidence produced at the trial of the above-entitled cause;

(2) The Court erred in failing to enter the Findings of Fact requested by the defendant;

(3) Conclusions of Law Nos. 1, 3, 4, 5, 6, 7 and 9, made and filed by the above-entitled Court, and each of them, are erroneous and not supported by and are contrary to the evidence and Findings of Fact made and filed by the above-entitled Court;

(4) The Court erred in refusing to find and enter the Conclusions of Law requested by defendant;

(5) The Court erred in finding that any of the taxes involved herein were unlawfully or erroneously assessed and collected and erred in refusing to grant defendant's motion for judgment.

CARL C. DONAUGH
United States Attorney for
the District of Oregon
J. MASON DILLARD
Assistant United States
Attorney

Filed April 20, 1939
G. H. Marsh, Clerk
By F. L. Buck, Chief Deputy. [111]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant, J. W. Maloney, hereby designates as the portions of the record, proceedings and evidence

to be contained in the record on appeal the following:

1. Complaint
2. Supplemental Complaint
3. Answer to Complaint
4. Reply to Answer
5. Answer to Supplemental Complaint
6. Reply to Answer to Supplemental Complaint
7. Stipulation for Trial without Jury
8. Defendant's Motion for Judgment
9. Defendant's Request for Findings of Fact and Conclusions of Law
10. Memorandum Opinion Filed Nov. 29, 1938
11. Supplemental Opinion Filed Dec. 20, 1938
12. Findings of Fact and Conclusions of Law
13. Judgment
14. Certificate of Probable Cause [113]
15. Transcript of Evidence and Proceedings at Trial
16. Notice of Appeal
17. Statement of Points
18. This designation.

CARL C. DONAUGH
United States Attorney
for the District of Oregon
J. MASON DILLARD
Assistant United States
Attorney

United States of America,
District of Oregon.—ss.

Service of the within DESIGNATION OF CONTENTS OF RECORD ON APPEAL is accepted in the State and District of Oregon this 19th day of April, 1939, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

CLARENCE D. PHILLIPS
Of Attorneys for Plaintiff

Filed April 20, 1939
G. H. Marsh, Clerk
By F. L. Buck, Chief Deputy. [114]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

The above plaintiff, Portland Associates, Inc., a corporation, hereby designates the following portions of the record proceedings and evidence in addition to the portions of the record proceeding in evidence heretofore designated by the above defendant to be contained in the record of appeal.

1. Plaintiff's motion for judgment.

2. Plaintiff's proposed findings of fact and conclusions of law.

3. All of the exhibits admitted in evidence in the above cause.

4. This designation.

GRIFFITH, PECK & COKE
By CLARENCE D. PHILLIPS
Attorneys for plaintiff.

State of Oregon
County of Multnomah.—ss.

Due, timely and legal service by copy admitted at Portland, Oregon this 21st day of April, 1939.

J. MASON DILLARD
of Attorneys for Defendant.

Filed April 24, 1939
G. H. Marsh, Clerk. [116]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL

THIS MATTER coming on to be heard on motion of defendant, by Carl C. Donaugh, United States Attorney for the District of Oregon, and M. B. Strayer, Assistant United States Attorney, for an order extending the time for docketing the appeal in the above-entitled cause in the Circuit Court of Appeals for the Ninth Circuit to and including the 17th day of June, 1939, and the Court being fully advised in the premises, IT IS CONSIDERED, ORDERED and DIRECTED that the time for docketing the appeal in the above-entitled

cause be, and it is hereby, extended to and including the 17th day of June, 1939.

Dated at Portland, Oregon, this 13th day of May, 1939.

CLAUDE McCOLLOCH,
District Judge

[Endorsed]: No. 7197 United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 3, 1939. Paul P. O'Brien, Clerk.

United States of America
District of Oregon.—ss.

I, G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 118 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein No. L-12934, in which J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, is defendant and appellant, and Portland Associates, Inc., is plaintiff and appellee; that the said transcript has been prepared in accordance with the designation of contents of the record on appeal filed by the appellant and by the appellee and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said

cause, in accordance with the said designations as the same appear of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $41.25 and that the same has been charged against the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of May, 1939.

[Seal] G. H. MARSH,

Clerk. [219]

[Endorsed]: No. 9197. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, Appellant, vs. Portland Associates, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 3, 1939.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

9197

J. W. MALONEY, Collector of Internal Revenue,
Portland, Oregon,

Appellant,

v.

PORTLAND ASSOCIATES, INC. a Corporation,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD TO BE PRINTED

COMES NOW the appellant, J. W. Maloney, and in compliance with Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit, states that upon the appeal he intends to rely upon the following points:

(1) That the Findings of Fact Nos. 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29 and 30, made and filed by the District Court of the United States for the District of Oregon, and each thereof, are erroneous and that they are not supported by and are contrary to the evidence produced at the trial of the above-entitled cause; that said Findings of Fact are set forth upon Pages 87-100, inclusive, of the original certified record herein.

(2) That the District Court erred in failing to enter the Findings of Fact requested by the appellant, said requested Findings of Fact being set forth upon Pages 71-77, inclusive, of the original certified record herein.

(3) That the Conclusions of Law Nos. 1, 3, 4, 5, 6, 7 and 9, made and filed by the District Court, and each thereof, are erroneous and are not supported by and are contrary to the evidence and Findings of Fact made and filed by the District Court; that said Conclusions of Law are set forth upon Pages 100-102, inclusive, of the original certified record herein.

(4) That the District Court erred in refusing to find and enter the Conclusions of Law requested by the appellant, and that said Conclusions of Law are set forth upon Pages 77 and 78 of the original certified record herein.

(5) That the District Court erred in finding that any of the taxes involved herein were unlawfully or erroneously assessed and collected, and erred in refusing to grant the appellant's motion for judgment; that said motion for judgment is set forth upon Pages 51 and 52 of the original certified record herein.

Appellant further designates the following parts of the record which he believes are necessary for the consideration of the foregoing points:

		Page	
1.	Complaint	1-21,	incl.
2.	Supplemental Complaint	23-29,	incl.
3.	Answer to Complaint	31-34	"
4.	Reply to Answer	36-37	
5.	Answer to Supplemental Complaint	39-42	"
6.	Reply to Answer to Supplemental Complaint	44-45	
7.	Stipulation for Trial without Jury	47	
8.	Defendant's Motion for Judgment	51-52	
9.	Defendant's Requested Findings of Fact and Conclusions of Law	71-78	"
10.	Memorandum Opinion filed Nov. 29, 1938	80-83	"
11.	Supplemental Opinion filed Dec. 20, 1938	85	
12.	Findings of Fact and Conclusions of Law	87-102	"
13.	Judgment	104-105	
14.	Certificate of Probable Cause	107	
15.	Transcript of Evidence and Proceedings at the Trial	120-218	"
16.	All Exhibits Introduced at the Trial	———	
17.	Notice of Appeal	109	
18.	Statement of Points	11	

19. Designation of Record 113-114
20. Plaintiff's Designation of Additional Portions of Record on Appeal 116
21. This Statement and Designation ———

Dated, this 31st day of May, 1939

CARL C. DONAUGH
United States Attorney for the District of Oregon

M. B. STRAYER
Assistant United States Attorney

United States of America,
District of Oregon.—ss.

Due and legal service of the within STATEMENT OF POINTS AND DESIGNATION OF RECORD TO BE PRINTED is hereby admitted and accepted within the State and District of Oregon, on the 31st day of May, 1939, by receiving a copy thereof duly certified to as a true and correct copy of the original by M. B. Strayer, Assistant United States Attorney for the District of Oregon.

CLARENCE D. PHILLIPS
Of Attorneys for Appellee

[Endorsed]: Filed Jun. 7, 1939. Paul P. O'Brien, Clerk.

No. 9197

In the United States Circuit Court of Appeals for the Ninth Circuit

J. W. MALONEY, COLLECTOR OF INTERNAL REVENUE, PORTLAND, OREGON, APPELLANT

v.

PORTLAND ASSOCIATES, INC., A CORPORATION, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
S. DEE HANSON,
Special Assistants to the Attorney General.
CARL C. DONAUGH,
United States Attorney.
MANLEY B. STRAYER,
Assistant United States Attorney.
THOMAS R. WINTER,
Special Assistant to the United States Attorney.
of Counsel.

FILED

SEP 1 1939

PAUL P. O'BRIEN,

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9197

J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, appellant

v.

Portland Associates, Inc., a Corporation, appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 82), which is not reported.

JURISDICTION

This is an appeal from a judgment entered January 7, 1939, in favor of the taxpayer, appellee herein, for documentary stamp taxes assessed and paid in the aggregate amount of $7,282.48, with interest according to law (R. 108–109). The case is brought to this Court by notice of appeal filed April 6, 1939 (R. 204–205). The jurisdiction of this

Court is invoked under Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTIONS PRESENTED

1. Whether the stamp tax is payable in respect of the transfer to a voting trust of the rights of subscribers to receive the taxpayer's stock, such transfer having been made pursuant to arrangements to which they did not become parties until and as a result of their subscriptions.

2. Whether the stamp tax is payable in respect of the transfer of the right to receive voting-trust certificates representing the taxpayer's capital stock.

3. Whether the granting of options to purchase the taxpayer's capital stock is subject to the stamp tax.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra,* pp. 47–53.

STATEMENT

The facts as found by the court below (R. 89–105), although challenged in part hereinafter, are substantially as follows:

The taxpayer was a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, Oregon, and was voluntarily dissolved by resolution as of December 24, 1935. Since that time, it has been engaged in the process

of liquidation, the collection of its debts, and distribution of assets to its stockholders (R. 89).

At all times herein mentioned, the appellant was and now is the duly appointed, qualified, and acting Collector of Internal Revenue for the District of Oregon, having his office in the City of Portland, Multnomah County, Oregon (R. 90).

In October 1933 the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the taxpayer in the sum of $9,772.29, together with a penalty of 5 per centum in the amount of $488.61, together with interest thereon in the sum of $123.42, making a total assessment of $10,384.32, and thereafter, on December 11, 1933, appellant gave notice of the assessment to the taxpayer (R. 90).

In November 1933, the Commissioner of Internal Revenue made an assessment against the taxpayer on account of documentary stamp taxes in the sum of $205.60, together with a penalty of 5 per centum in the sum of $10.28, together with interest thereon in the sum of $2.60, making a total assessment of $218.48, together with an additional amount of interest in the sum of $41.29, making a total assessment of $259.77, and thereafter on December 11, 1933, appellant gave notice of the assessment to the taxpayer (R. 90).

Thereafter appellant caused notice of tax lien, on account of said assessment, to be filed in Multnomah County, Oregon, Big Horn County, Wyoming, Park County, Wyoming, and Yellowstone

County, Montana, the taxpayer having property situated in those counties in Wyoming and Montana (R. 91).

On March 5, 1935, the taxpayer paid to appellant, under protest, the sum of $1,989.10 as documentary stamp taxes previously assessed by the Commissioner of Internal Revenue; on or about November 2, 1935, the taxpayer paid to appellant, under protest, the sum of $10,474.30, being the balance claimed to be due and owing for documentary stamp taxes, and thereafter appellant caused the liens hereinbefore referred to to be satisfied and discharged of record (R. 91).

On November 15, 1935, the taxpayer filed with appellant, as Collector of Internal Revenue, a claim for refund of documentary stamp taxes, penalties, and interest previously paid in the sum of $10,298.18, of which $8,124.51 represented stamp taxes previously assessed and paid, and $2,173.67 thereof represented penalties and interest previously assessed and paid on the stamp taxes (R. 91).

Thereafter, on February 18, 1937, the Commissioner of Internal Revenue authorized a refund upon the claim for refund in the amount of $2,950.90, and rejected the taxpayer's claim for refund in the sum of $7,347.28. Thereafter, on or about the 2nd day of March 1937, appellant, in accordance with the ruling of the Commissioner upon the claim for refund, paid to the taxpayer, as a refund, the sum of $2,950.90, which represented a refund of documentary stamp taxes previously assessed

by the Commissioner in the sum of $2,300, which was paid by the taxpayer, and $650.90 represented the refund of penalties and interest previously assessed by the Commissioner and paid by the taxpayer (R. 92).

Prior to filing complaint herein, more than six months had elapsed since the date of the filing of the claim for refund, and the Commissioner of Internal Revenue, on February 18, 1937, notified the taxpayer by letter that the claim for refund had been rejected in the amount of $7,347.28 (R. 92).

On January 11, 1936, the Commissioner of Internal Revenue made and levied an assessment for documentary stamp taxes against the taxpayer in the sum of $2,800, and thereafter, on January 22, 1936, the appellant made demand upon the taxpayer for the payment of the tax, together with penalties and interest thereon. Thereafter, on about the 8th day of February, subsequent notice and demand was given by appellant to the taxpayer and accordingly, on February 16, 1937, the taxpayer paid to appellant, under protest, the sum of $2,800, together with penalty and interest thereon in the sum of $175.81, or a total payment of $2,975.81 on account of said documentary stamp taxes (R. 92–93).

Thereafter, on February 17, 1937, the taxpayer filed with appellant its claim for refund in the sum of $2,975.81, including $2,800 documentary stamp taxes and $175.81 interest and penalties, and claimed a refund in the total amount of $2,975.81 (R. 93).

On September 18, 1937, the Commissioner of Internal Revenue rejected the taxpayer's claim for refund in the total amount of $2,975.81 (R. 93).

Prior to filing complaint herein, more than six months elapsed since the date of the filing of the claim for refund and the claim for refund has now been rejected in the total amount (R. 93–94).

On April 6, 1931, the taxpayer corporation was organized under the laws of the State of Oregon, with an authorized capital stock of 350,000 shares, having a par value of one dollar per share. On May 1, 1931, subscriptions were made to the capital stock, as shown by the minute records of said corporation, as follows (R. 94–96):

> C. R. Griffith does hereby subscribe for 349,996 shares of the par value of $1.00 per share, aggregating $349,996.00, of Portland Associates, Inc., an Oregon corporation, and agrees to pay for the same by transferring and assigning to the corporation that certain indenture of lease entered into under day of March 13th, 1931, by and between Montana and Wyoming Oil Company as lessor and C. R. Griffith, trustee, as lessee, covering the following described real property in the county of Big Horn and State of Wyoming:
>
> > The southwest (SW) quarter of the southeast (SE) quarter and the southeast (SE) quarter of the southwest (SW) quarter of section 28 in township 56 north of range 97 west of the sixth

principal meridian, containing 80 acres more or less.

and by transferring and delivering to the corporation that certain drilling contract dated April 16th, 1931, and secured by said trustee and his associates for this corporation from Paul Stock, of Cody, Wyoming, as driller.

The undersigned agrees that if this conditional subscription is accepted that he will donate 249,996 shares of said capital stock to the corporation for sale by it upon such terms and conditions as it may desire to sell the same or for use by it in any manner it desires, subject however to a voting trust agreement to be executed prior to the time said stock is delivered to this corporation. In the event this conditional subscription is accepted the undersigned directs that 60,000 shares of said stock be issued to Casing-Head Gas & Oil Co., that 15,000 shares of said stock be issued to M. F. Swift, that 25,000 shares of said stock be issued to C. R. Griffith, and that the remaining 249,996 shares be issued to the Secretary of Portland Associates, Inc., in trust for said corporation and such distribution as may from time to time be determined upon by the directors of said Portland Associates, Inc.

C. R. Griffith.

We, the undersigned, do hereby subscribe for the number of shares of capital stock of Portland Associates, Inc., set after our

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names and agree to pay therefor at the rate of $1.00 per share upon call of said subscription.

Name:	*Number of Shares*
Franklin T. Griffith	One
N. F. Swift	One
E. W. Battleson	One
S. M. Mears	One

The stockholders of the corporation accepted the offer of C. R. Griffith at a meeting of stockholders held May 1, 1931, and the directors of the corporation accepted the offer at a directors' meeting held May 1, 1931 (R. 96).

Certificate of stock No. 1 was issued to C. R. Griffith for 349,996 shares, and certificates Nos. 2, 3, 4, and 5 were issued to Franklin T. Griffith, S. M. Mears, E. W. Battleson, and M. F. Swift for one share each, and a documentary stamp tax was paid on the issuance of those certificates in the amount of $175.20. Thereafter, certificate No. 1 was endorsed and transferred by C. R. Griffith to Franklin T. Griffith, C. R. Griffith, and E. M. Steell, Trustees, transferring to the Trustees 349,995 shares, and certificate No. 6 for that number of shares was issued to the Trustees and a transfer tax in the amount of $70 was paid thereon. Certificate No. 8 was a void certificate used as a specimen only. Certificate No. 9 was issued to Paul Stock for one share, and Certificate No. 10 was issued to H. K. Senor for one share, being transfers from the Trustees, and a documentary stamp tax in the sum of four cents was paid on those transfers (R. 96–97).

A stamp tax was paid in the amount of three dollars on the authorization of C. R. Griffith to transfer 15,000 shares to M. F. Swift, and a documentary stamp tax of $12 was assessed and paid on the authorization to transfer 60,000 shares to Casing-Head Gas & Oil Company (R. 97).

There was no transfer of stock from C. R. Griffith to Portland Associates, Inc., or to the treasury of said corporation, or to anyone as an officer of the corporation (R. 97).

On October 1, 1931, the Articles of Incorporation of the taxpayer were amended, changing and increasing the authorized capital stock of the corporation from 350,000 shares of the par value of one dollar each, to 750,000 shares without par value, and there was issued one share of no par value for each share of one dollar par value stock then outstanding (R. 97).

At the time of the increase and change in the authorized capital stock of the taxpayer on October 1, 1931, the following resolution was adopted by the stockholders and directors (R. 135–136):

> Resolved that each and every share of said increase of capital stock so issued, sold, or disposed of shall be under and subject to all of the terms and conditions of that certain voting trust agreement entered into May 1, 1931, by and between the stockholders of Portland Associates, Inc., and Franklin T. Griffith, C. R. Griffith, and E. M. Steell, Trustees, under which agreement Henry F. Waechter has been substituted for E. M.

> Steell as such trustee. There shall be issued to each purchaser of any part of said increase of capital stock voting trust certificates under said voting trust agreement and there shall be issued to said Trustees for the benefit of such purchasers certificates of stock for a corresponding number of shares so sold, the same to be held by said Trustees under said voting trust agreement for the use and benefit of the purchasers of said units, the money paid for said units to go into the corporate treasury for the use and benefit of Portland Associates, Inc. (This paragraph is not included in the findings of fact of the court below.)

There was issued to Franklin T. Griffith, C. R. Griffith, and E. M. Steell, as Trustees, certificate No. 7, representing 505,000 shares of the capital stock, which included 349,995 shares transferred to the Trustees above named by stock certificate No. 6, dated September 22, 1931, and the additional 155,005 shares were issued in addition thereto under the authorization of the directors and stockholders of the corporation (R. 97–98).

An original issue documentary stamp tax was paid upon the 155,000 shares in the sum of $77.50. There was no transfer to the Trustees as shown by the records of the corporation other than the issuance of the above-mentioned certificate (R. 98).

The original subscription of C. R. Griffith for 349,996 shares of the capital stock of the corpora-

tion was conditioned upon the creation of a voting trust. A voting trust agreement was made and entered into as of May 1, 1933, between all of the stockholders of Portland Associates, Inc., and Franklin T. Griffith, C. R. Griffith, and E. M. Steell as voting trustees, and all of the stock of the corporation (except directors' qualifying shares) was held under the terms of the voting trust agreement. The Title and Trust Company, Portland, Oregon, acted as depositary under the agreement, and acted as agent of the voting trustees. The voting trustees sold voting trust certificates to various individuals and received the money therefor and paid the same into the treasury of the corporation, and caused to be issued to the purchasers of the certificates voting trust certificates. The taxpayer, Portland Associates, Inc., was not a party to the voting trust agreement and did not issue or cause to be issued any of the voting trust certificates. The voting trust agreement was made for the benefit of the stockholders of the corporation, and expressly provided that the entire outstanding capital stock of Portland Associates, except directors' qualifying shares, has been acquired and transferred to the Trustees upon the express understanding and agreement that all of the shares of stock will be assigned and delivered to the Trustees, the latter to hold and exercise the rights appertaining thereto under the terms of the agreement (R. 98–99).

No stock certificates have been issued by the taxpayer-corporation except stock certificates to the voting trustees and directors' qualifying shares of one share each to each of the directors of the corporation. Except as herein otherwise specifically found and declared, no person had any right to receive shares of stock in the taxpayer-corporation or certificates representing shares of stock issued by it except the voting trustees and the directors qualifying, one share each (R. 99).

Among other things, there was assessed, levied against, and collected from the taxpayer a documentary stamp tax in the sum of $3,100 as a transfer tax upon 155,000 shares of stock. The records of the corporation do not show any transfer of 155,000 shares of the capital stock upon which such tax can be assessed, levied, or collected (R. 100).

Among other things, there was assessed, levied against, and collected from the taxpayer the sum of $50, documentary stamp tax on a transfer of stock from C. R. Griffith to the treasury of the corporation. The records of the corporation do not show any transfer upon which such a tax can be assessel, levied, or collected, but since the corporation had the technical right to require that the mechanics provided in the original stock subscription be carried out—namely, donation to the treasury of the shares in question, then transfer by the corporation to the voting trustees rather than transfer direct by the subscriber to the voting trustees—the tax is justified, and it was therefore

legally assessed, levied, and collected in the amount of $50 upon such transfer (R. 100).

Among other things, there was assessed, levied against, and collected from the taxpayer a documentary stamp tax in the sum of $140 on purported transfers as of June 20, 1932, but the records of the corporation do not disclose any transfer of capital stock as of June 20, 1932, upon which the tax could be levied, assessed, or collected (R. 100–101).

Among other things, there has been assessed and levied against and collected from the taxpayer the sum of $120 upon a purported transfer subsequent to June 21, 1932,[1] and a refund has been made thereon in the sum of $60, leaving an assessment and collection on account thereof in the sum of $60. The records of the corporation do not disclose any such transfer of capital stock upon which a documentary stamp tax could be assessed, levied, or collected (R. 101).

There has been assessed, levied against, and collected from the corporation documentary stamp taxes on purported transfers of voting trust certificates, including a transfer tax on all of the voting trust certificates, but there was no transfer of certificates or of the right to receive by the taxpayer upon the voting trust certificates listed in the voting trust certificate books as original issues upon which a tax could be assessed, levied, or collected. The

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[1] The effective date of Section 723 of the Revenue Act of 1932, *infra*.

voting trust certificates are as follows (R. 101–102):

> 1 to 38, inclusive; 41, 42, 46 to 52, inclusive; 54 to 66, inclusive; 68 to 118, inclusive; 127, 129, 157, 158, 204 to 208, inclusive; 222, 223, 233 to 236, inclusive; 244 to 247, inclusive; 76 to 84, inclusive; 290, 294 to 334, inclusive; 339 to 342, inclusive; 359, 360, 361, 374, 411 to 416, inclusive.

Documentary stamp tax on transfer was assessed and levied against and collected from the above corporation on certain voting-trust certificates. The records of the corporation show, however, that there was no transfer of the certificates, which are numbered as follows (R. 102):

> 228, 409, and 417.

The minute records of the corporation show that at an adjourned meeting of the Board of Directors held January 27, 1932, resolutions were adopted as follows (R. 102–104):

> Resolved, that this corporation purchase all of the capital stock of Big Horn Oil & Refining Company, a corporation duly incorporated under the laws of the State of Montana, in accordance with the proposition which has been submitted to this corporation by Mr. Paul Stock, representing the owners of all of the issues and outstanding stock of said Big Horn Oil & Refining Company, and in payment therefor issue

95,000 shares of the capital stock of this corporation as follows:

	Shares
To Jeff Tingle	2,000
E. J. Fleming	10,000
Mrs. E. E. Fleming	2,000
T. R. Graham	1,000
J. E. Simon	500
R. J. O'Malley	2,000
J. G. Everett	19,000
G. H. Downs	1,000
Paul Stock	57,500

Be it further resolved, that in consideration of Mr. Paul Stock's assuming and agreeing to pay or cancel the following indebtedness of said Big Horn Oil & Refining Company, as shown by the audit of the books of said company of December 31, 1931, to-wit:

Paul Stock	$3,929.45
E. J. Fleming	3,500.00
J. G. Everett, representing the claim of Associated Independent Dealers	1,331.72
J. G. Everett	1,000.00

this corporation hereby grants to said Paul Stock the option to purchase 15,000 shares of the capital stock of this corporation at $1.00 per share at any time prior to July 31, 1932.

Resolved that in consideration of his lending this corporation the sum of $10,000, Mr. E. W. Battleson be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share.

Resolved that in consideration of his lending this corporation the sum of $100,000, Mr.

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> Franklin T. Griffith be and he hereby is granted an option to purchase 10,000 shares of the capital stock of this corporation at any time prior to July 31, 1932, at the price of $1.00 per share.

No option agreements were made in writing between the corporation and the respective parties mentioned in the resolution. No money was ever paid by any of the persons mentioned in the resolutions for the purchase of any stock as mentioned in the purported options, and no stock was ever issued by the taxpayer to any of the persons on account of the purported options. None of the persons ever received any such stock and did not have the right to receive such stock unless and until they should pay the money therefor. There was no issuance or transfer of any stock in the corporation to any of the persons which was subject to documentary stamp tax either for issuance or transfer on account of the recitations in the minutes. The appellant has admitted by stipulation in the court below that the taxpayer is entitled to at least the sum of $700 on this item and the court finds that it is entitled to a total amount of $1,400 (R. 104).

There is competent evidence to show that voting trust certificates representing 35,000 shares of capital stock of the taxpayer were assigned, transferred, and delivered by Paul Stock to the corporation, and that the transfer thereof was taxable in the amount of $1,400 (R. 105).

Upon the basis of the foregoing facts, the court below held that there was no stamp tax due on a transfer of the right to receive stock to the Trustees who held for the benefit of the subscribing stockholders (R. 83); on the transfer of a right to receive voting trust certificates (R. 85–86); or on the issuance of the options embodied in the corporate resolutions (R. 86), as contended by the taxpayer. It upheld, however, the Government's contentions that liability for stamp taxes was incurred in connection with the transfer of the voting trust certificates (R. 87–88), and also on the direct transfer by stockholders to the voting trustees of the shares which were intended to have been donated to the corporation and by it transferred to the trustees (R. 83–84). The District Court thereupon entered judgment accordingly (R. 108–109). From the judgment so entered, the appellant took this appeal (R. 204–205).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred (R. 205–206, 212–215):

1. In that Findings of Fact Nos. 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, and 30, made and filed by the court below (R. 96–104), and each of them, are erroneous, are not supported by, and are contrary to, the evidence produced at the trial of the above-entitled cause.

2. In failing to enter the Findings of Fact (R. 70–80) requested by the defendant, appellant herein.

3. In that Conclusions of Law Nos. 1, 3, 4, 5, 6, 7, and 9, made and filed by the court below (R. 105–107), and each of them, are erroneous, are not supported by, and are contrary to, the evidence and Findings of Fact made and filed by the District Court.

4. In refusing to find and enter the Conclusions of Law (R. 80–82) requested by defendant, appellant herein.

5. In finding that any of the taxes involved herein were unlawfully or erroneously assessed and collected, and in refusing to grant defendant's (appellant's) motion for judgment (R. 49–51).

SUMMARY OF ARGUMENT

1. The shares involved in this issue were part of the *increase* in the taxpayer's authorized capital stock and represented original subscriptions for which the first and only certificate, No. 7, was issued from the taxpayer to the voting trust. The issuance of that certificate to the trust amounted, contrary to the findings and conclusion of the court below, to a transfer by the subscribers, who paid for the stock, of their rights to receive the shares of the voting trust, which is taxable under the statute. This is shown by the great weight of the evidence. The adverse findings and conclusions of the court below should therefore be set aside and correct conclusions drawn by this Court to the effect that the subscribers actually had the right to receive the shares, and consequently the transfer

thereof was taxable. The statute and the pertinent regulations provide for taxation of such transactions.

The generating source of the right to receive the newly issued shares of the taxpayer was the payment to it, through the trust, of the consideration therefor by the subscribers who received the voting trust certificates, not by the voting trustees. The new shares could not lawfully be issued to others without the subscribers' authority. The grant of that authority, clearly shown by the evidence, is a transfer of "the right to receive" within the meaning of the statute. The voting trustees are not shown to have been entitled to receive and hold the taxpayer's stock without a grant of the right to do so by the purchasers, the subscribers, or owners of the voting trust certificates. Since the voting trustees received and held greater interests and powers in the stock involved than is possessed by nominees, upon admitted transfers to them, we think the effective disposition of the rights of the purchasers, the subscribers, or owners of the voting trust certificates, to subscribe for or to receive the shares or certificates of the stock purchased, unquestionably constituted taxable transfers, just as if the several or separate relationships of the parties had been established at different times and by separate instruments.

2. The court below erred in holding that the transfer of the right to receive the voting trust certificates representing the taxpayer's stock is not

taxable. The Treasury Department has consistently held that transfers of voting trust certificates and transfers of the right to receive such certificates are taxable since they carry all the rights of the stock, except the voting power, including the right to receive the stock upon dissolution of the voting trust, as herein. We think the Treasury Department's position therein is sound and has been justified under the statutes as broadly and liberally interpreted by judicial authority. Under the rules thus laid down, the subject of the tax embraces the right to receive any certificate or interest in the taxpayer's property and the transfers of rights to subscribe for or receive shares or certificates, whether made upon the books of the taxpayer or by any other evidence.

There is ample evidence herein to show such rights to receive voting trust certificates representing the taxpayer's stock. Therefore, the findings of the court below to the contrary should be set aside, and the rights to receive the voting trust certificates representing the taxpayer's capital stock held taxable.

3. The court below erred, we submit, in holding that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option, and that Congress would have used the word "option" in the statute if it had intended to tax the grant of options. It is settled, however, that an "agreement to sell," as provided in the statute, may be referred to as either a "call" or an

"option," and that, in either event, it is taxable, whether or not exercised, since each constitutes an absolute promise to sell.

The taxpayer became absolutely obligated to sell the shares of stock referred to in the directors' resolution herein, and since the options were given for sufficient consideration they were taxable as "agreements to sell," as provided by the statute and regulations.

ARGUMENT

I

The transfer to the voting trust of the rights of the subscribers to receive the taxpayer's stock, made pursuant to the arrangements to which they did not become parties until and as a result of their subscriptions, is subject to the stamp tax within the meaning of schedule A-3, title VIII, Revenue Act of 1926, as amended

A résumé of the somewhat complicated facts pertaining to this issue may be helpful. After the increase of the taxpayer's authorized capital stock from 350,000 to 750,000 shares on October 1, 1931 (R. 97, 119), and pursuant to the resolutions adopted on the same date (R. 135–136), 155,000 shares of the new no par value stock were subscribed for by various individuals (R. 160). The subscriptions were paid to the voting trustees who, in turn, paid the money therefor to the taxpayer (R. 135, 159–160, 171). Thereafter, on April 5, 1932, the taxpayer issued its stock certificate No. 7 for 505,000 shares of its new no par value stock to Franklin T. Griffith et al., Trustees (R. 153, 157).

The 505,000 shares included the 349,995 shares previously transferred to the trustees by stock certificate No. 6, issued September 22, 1931 (stock certificate No. 6 having been surrendered to the taxpayer for cancellation), and also the above-mentioned 155,000 shares subscribed for during the previous several months (R. 125–127, 144–145, 172–173), for which the subscribers received voting trust certificates (R. 136–137).

The Commissioner of Internal Revenue taxed this transaction as a transfer by the various subscribers of their right to receive 155,000 shares of the taxpayer's new stock, the tax assessed and paid thereon having been two cents per share, or $3,100 (R. 100, 171).

The court below allowed recovery, holding that no stamp tax was due on the transaction involving the issuance of the stock to the trustees to hold for the benefit of the subscribing stockholders. The reason assigned was that the stockholders never had the right to receive such shares, and consequently no transfer of the rights to receive them occurred (Par. 1, R. 83; Finding XXIV, R. 100). In so doing, the court relied on the decision of this Court in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, and attempted to distinguish *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, and *United States* v. *Automatic Washer Co.,* decided *sub nom. Founders General Co.* v. *Hoey,* 300 U. S. 268, 273–274, "and other cases" (R. 83) on the ground that, in such cases, this right existed.

We submit that the basis of the decision of the court below is untenable; that the finding and conclusion that the transfer of the 155,000 shares was not one upon which a stamp tax attached (R. 100, 105) is contrary to the evidence; that the court below erred in holding that there was no transfer of rights to receive the stock because the subscribers never had any rights to receive it (R. 83); and that therefore this Court should set aside the adverse finding and correctly hold that the transfer by the subscribers to the taxpayer's stock of their rights to receive the 155,000 shares is taxable within the meaning of the pertinent statute and regulations.

The shares involved in this issue were part of the *increase* effected October 1, 1931, in the taxpayer's authorized capital stock and represented original subscriptions by the various subscribers for which the first and only certificate issued was stock certificate No. 7, issued April 5, 1932, from the taxpayer to the voting trust. It is apparent, therefore, that the issuance of stock certificate No. 7 to the voting trust amounted, contrary to the findings and conclusion of the court below, to a transfer by the subscribers, who paid for the stock, of their rights to receive the shares of the voting trust, which is taxable under the act. This is shown by the great weight of the evidence.

The evidence shows that (R. 137, 161)—

> * * * when they bought the stock or the voting trust certificates they were buying

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> voting trust certificates, *which would entitle them to a certificate of stock* for the same same number of shares at the expiration of the voting trust. [Italics supplied.]

That the voting trustees "never subscribed to stock" (R. 160); that "the only certificates that were held by those purchasing [an] interest in the corporation were voting certificates" (R. 137); and "upon the expiration of the voting trust * * * those purchasing [voting trust certificates] would have been entitled to a share of stock in the corporation" (R. 138). The corporate records showed that (R. 136, 146–147)—

> There shall be issued to each *purchaser of any part of said increase of capital stock* voting trust certificates under said voting trust agreement and there shall be issued to said Trustees for the benefit of such purchasers certificates of stock for a corresponding number of shares so sold, the same to be held by said Trustees under said voting trust agreement for the use and benefit of the purchasers of said units. * * * [Italics supplied.]

and it was testified that the taxpayer corporation "authorized the issuing of them" [that is, the voting-trust certificates] (R. 147). This shows that the subscriber was the "purchaser * * * of the capital stock" who merely yielded his right to receive it for a voting-trust certificate authorized to be issued by the taxpayer corporation. The evi-

dence also shows that on "the subscription agreement involving the original 350,000 shares, it was there stated that the purchaser of the shares would purchase them pursuant to the voting-trust agreement" (R. 183), and that while no *certificates* of stock were issued to them, still "shares were bought" (R. 185) by the subscribing stockholders who paid the taxpayer for them through the voting trustees (R. 135, 159–160, 171).

It cannot be said, therefore, that this evidence supports the findings of the court below that the subscribing stockholders never had the right to receive the shares. It shows exactly the contrary. They paid for the shares and elected to have the voting trust hold them, receiving, however, trust certificates, share for share, representing their "purchasing [and] interest in the corporation" (R. 137). Clearly therefore, they had the right to receive the shares, merely foregoing exercising the right in order to permit the carrying out of the purposes of the voting trust arrangement. This is exemplified in the colloquy during the cross examination of internal revenue agent Canneddy (R. 194–197). The adverse findings and conclusions of the court below should therefore be set aside, as contrary to the great weight of the evidence,[2] and correct conclusions drawn by this Court

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[2] Findings of fact which are clearly erroneous may be set aside. Rule 52 (a), Rules of Civil Procedure. In the Proceedings of the Institute of Federal Rules, 1938, pub-

to the effect that the subscribers actually had the right to receive the shares and consequently the transfer thereof was taxable.

Section 800, Title VIII, of the Revenue Act of 1926 expressly provides:

> * * * there shall be levied, collected, and paid, for and in respect of the several bonds, * * * certificates of stock and indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, * * *, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such Schedule.

While practically identical statutes appearing in prior revenue acts were considered in earlier cases, the above section was first construed in *Raybestos-*

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lished by the American Bar Association, it is stated (p. 383), as follows:

"But of course Rule 52 (a) specifies the test that will be applied in appellate courts in passing on the question of whether findings are sustained by the evidence, and the test is whether they are clearly erroneous or not; in other words, the test is whether the weight of the evidence is clearly against the findings."

Manhattan Co. v. *United States,* 296 U. S. 60, wherein the Court expressly stated (p. 61):

> Section 800 imposes liability for the tax upon the transferor, the transferee, and the corporation whose stock is transferred.

The statute, in so far as here applicable, discloses an undoubted intent to tax deliveries of, or transfers of, either (1) legal title to shares or certificates of stock, or (2) rights to receive such shares or certificates. Literally read, the statute taxes such a transfer or delivery, whether effected by voluntary act, involuntary act, or by operation of law, for it makes no exemptions. *Welch* v. *Kerckhoff,* 84 F. (2d) 295 (C. C. A. 9th).

Article 34 of Treasury Regulations 71 expressly provides that the following transactions, among others, are subject to the tax: All sales, or transfers, or changes of ownership, of shares or certificates of stock, or of profits, or of interest in property, or accumulations, in any corporation, or of the interest of a subscriber for stock, or of the right to subscribe for stock, *or of the right to receive stock,* or of the right to receive a stock dividend, whether or not represented by certificates, regardless of how evidenced and whether or not the holders thereof are entitled in any manner to the benefit of such stock. This is a reasonable regulation and should be given effect.

Thus it is seen that the transactions involved herein constituted taxable deliveries or transfers by the purchasers and subscribers, or holders of voting trust certificates, to the voting trustees within the meaning of the statute and Regulations 71, *infra,* promulgated thereunder.

The generating source of the right to receive the newly issued shares of the taxpayer was the furnishing and payment to it, through the trust, of the consideration therefor by the subscribers or persons who received the voting trust certificates or beneficial interests, not by the voting trustees. The new shares could not lawfully be issued to any others than such persons without their authority. *Raybestos-Manhattan Co.* v. *United States, supra.* The legality of the issuance of the stock in the names of the trustees rests on the fact that the subscribers or persons furnishing the consideration, in some manner or by some form of procedure, such as an agreement, causing the stock purchased to be issued to the voting trustees, or by accepting voting trust certificates and becoming parties to the voting trust agreement, or otherwise so directing, authorized such issuance and granted to their trustees the right to receive the stock entered in their names. *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275; *Standard Oil Co. of California* v. *United States,* 90 F. (2d) 571, 573 (C. C. A. 9th). The grant of that authority is a transfer of "the right to receive" within the meaning of the Act; and we are not to look beyond the Act for further criteria of taxa-

bility. *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Founders General Co.* v. *Hoey, supra; Standard Oil Co. of California* v. *United States, supra.* The grant of that authority is clearly demonstrated by the evidence, as heretofore shown. Moreover, since the evidence discloses that the trustees held title to and the certificates of stock involved, with the right to exercise certain powers incidental thereto, as trustees for the subscribers or beneficial owners, who are described as owners of voting trust certificates and collectively called stockholders under the voting trust agreement, without being liable upon said stock as owners thereof, it can hardly be fairly said that the voting trustees herein were the subscribers and are the beneficial owners, in fact, of the taxpayer's stock, or were in their own right entitled to receive and hold the stock, without a grant of the right so to do by the purchasers, the actual subscribers, who were the beneficial owners of the shares here involved.

Since the voting trustees herein received and held greater interests in and possessed greater powers with respect to the shares of stock involved than is possessed by nominees upon admitted transfers to them, we think the effective disposition made of the rights of the purchasers, subscribers, or owners of voting trust certificates to receive legal title to, or to receive the shares or certificates of the stock purchased, unquestionably constitutes taxable transfers, the same as if the several or separate relationships of the parties (*New Colonial Co.* v. *Helvering,*

292 U. S. 435) had been established at different times and by separate instruments. *Raybestos-Manhattan Co.* v. *United States, supra; Founders General Co.* v. *Hoey, supra; Ladner* v. *Pennroad Corp., infra; Standard Oil Co. of California* v. *United States, supra; Welch* v. *Kerkhoff, infra; In re Consolidated Automatic Merchandising Corp.,* 90 F. (2d) 598 (C. C. A. 2d); *United States* v. *Vortex Cup Co.,* 84 F. (2d) 925 (C. C. A. 7th); *United States* v. *Brown Fence & Wire Co.,* 9 F. Supp. 1008 (N. D. Ohio), affirmed, 88 F. (2d) 1005 (C. C. A. 6th); *Orrington Co.* v. *United States* (N. D. Ill.), decided November 17, 1937, not reported.

We submit this case is concluded by the decisions of the Supreme Court in *Raybestos-Manhattan Co.* v. *United States, supra,* and *Founders General Co.* v. *Hoey, supra.*

In the *Raybestos-Manhattan* case, two corporations, pursuant to a consolidation agreement, conveyed their property to a new corporation in return for shares of its capital stock, issued not to the two corporations but directly to their stockholders in proportion to their holdings in those corporations. The Supreme Court held that the transaction was subject to a stamp tax under Section 800 of the Revenue Act of 1926, not only on the original issue of the shares but also on the transfers necessarily involved whereby the rights to receive the shares, inherent in the two corporations by operation of law, were transferred by the agreement to the stockholders.

We think the decision in that case is at variance, in principle, with the rules laid down by this Court in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, just as the Circuit Court of Appeals for the First Circuit thought, in deciding *Baker* v. *United States, supra,* after the decisions in the *Raybestos-Manhattan* and *Founders General Co.* cases had been handed down, upon reconsideration of its previous decision in *White* v. *Consolidated Equities, Inc., supra.* In the present case, as in the *Raybestos-Manhattan* case, those subscribers who paid for the taxpayer's capital stock were entitled to receive the stock. When the subscribers in the present case agreed, by purchasing subject to the corporate resolution (R. 135–136) and in accordance with the voting trust agreement, to the issuance to the trustees of stock certificate No. 7, representing their shares as well as other shares, they thereby transferred their right to receive the stock just as the two former corporations in the *Raybestos-Manhattan* case, by the consolidation agreement, transferred their right to receive the new corporation's stock to their stockholders.

In *Founders General Co.* v. *Hoey, supra,* a new corporation took over the assets of an old one and agreed to issue its shares to the old stockholders. In pursuance of an irrevocable agreement and power of attorney previously executed by the stockholders, however, portions of their new allotment, pro rata, were issued directly to their attorney for

purposes of sale. The Supreme Court held that there was a taxable transfer from the stockholders to the attorney of the "right to receive" shares under Section 800, Schedule A–3, Revenue Act of 1926.

Ladner v. *Pennroad Corp.,* 97 F. (2d) 10 (C. C. A. 3d), certiorari denied, 300 U. S. 618, involved exactly the same situation as herein. There the voting trustees agreed to issue voting-trust certificates to subscribers for the taxpayer corporation's stock upon receipt of the stock certificates from the corporation. This procedure was followed, with the result that the corporation received the subscription payments, the trustees received the stock, and the subscribers received the voting-trust certificates. In holding that the transaction represented a transfer of the right to receive stock, the court pointed out that under ordinary procedure, a voting trust is created by the stockholders depositing stock issued to them with the trustees, which automatically incurs the stamp tax. The short-cut procedure whereby the stock was issued directly to the trustees did not, in the opinion of the court, obviate the obligation to pay the transfer tax, as the facts were held to establish that the right to receive the shares was transferred from the subscribers to the trustees. The court stated (p. 11):

> It will be noted that the subscribers sent checks for the stock to the appellee; the appellee issued stock to the trustees, who then

> issued trust certificates to the subscribers. The question is whether this transaction is subject to documentary tax. A voting trust is ordinarily created by stock being issued to stockholders who in turn deposit it with the trustees. Such a transaction automatically incurs the stamp tax. The fact that the stock in this case was delivered directly to the trustees does not, in our opinion, obviate the obligation to pay the stamp tax. A transfer of the right to receive stock is taxable within the meaning of the Revenue Act of 1926, Title 8, Sec. 800, Schedule A–3, 26 U. S. C. A., Sec. 902 and note, and Articles 31 and 34 of Treasury Regulations 71.

The only distinction, upon the facts, between that and the instant cases is that there the subscription price was paid directly to the corporation, whereas herein it was paid to the trustees who turned it over to the taxpayer corporation. We submit that this difference is immaterial.

The voting trust, organized to hold the taxpayer's stock and thus maintain control of the company, offered voting-trust certificates for sale (R. 114). The subscription price of these certificates was turned over by the trust to the taxpayer for stock against which voting-trust certificates were issued to the subscribers (R. 135). *White* v. *Consolidated Equities,* 78 F. (2d) 435 (C. C. A. 1st), holding that there is no documentary stamp tax on a transaction involving a like transfer, under circumstances not unlike those herein, was, in effect, over-

ruled by the Supreme Court in the later cases of *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, and *Founders General Co.* v. *Hoey,* 300 U. S. 268. The Circuit Court of Appeals for the First Circuit (which had decided the *White* case) took cognizance thereof in *United States* v. *Baker* (C. C. A. 1st), decided March 25, 1939, not yet reported but found in 1939 Prentice Hall, Vol. 1, Par. 5.319, an analogous case, wherein it stated:

> As the cases cited above [that is, *Raybestos-Manhattan Co.* v. *United States, Founders General Co.* v. *Hoey,* and *Ladner* v. *Pennroad Corp.,* 97 F. (2d) 10 (C. C. A. 3d), certiorari denied, 305 U. S. 618] were decided since the case of *White* v. *Consolidated Equities, Inc.,* 78 F. (2d) 435, we think they should be followed.[3]

In that case, the investment trust issued certain of its shares to a voting trust and in return for such shares, the voting trust delivered an equal number of voting trust certificates. The voting trust certificates were later sold to the public, the transaction being accomplished by the investment trust's surrendering the certificates it held and directing the transfer agent to issue and deliver new voting trust certificates for an equivalent number in the name of the purchaser. The court agreed with the Government's contention that the transaction was,

---

[3] The Circuit Court of Appeals, however, attempted to distinguish the *White* case, but we think the facts and issues in both of those cases, as well as in the instant case, are substantially similar.

in substance, a transfer of the voting trust certificates into the hands of the public, and held that the sale of such certificates was subject to the stock transfer tax since the beneficial and equitable interests in the investment trust stock were thereby transferred to and received by the purchasers.

In deciding the present case, the court below cited this Court's decision in *Corporation of America* v. *McLaughlin,* 100 F. (2d) 72, which is fairly analogous although there are some factual differences. In that case, the trust had been created in 1917 under an agreement with the subscribing stockholders whereby stock of the corporation was to be held in trust for their benefit. The tax on the original shares then delivered or subsequent shares delivered to the trustees up to 1926 was not at issue. The first cause of action related to the imposition of an additional transfer tax on shares issued directly to the trustees during 1927 and 1928. Of such stock so issued, this Court held the delivery of shares constituting a stock dividend did not incur additional liability based on the transfer of the right of the stockholders to such stock. As to a further lot of shares issued pursuant to sales by the corporation and direct issuance to the trustees, the Court likewise held no additional transfer tax, based on the right to receive such shares, was due. The Court pointed out that the beneficiaries purchased certificates of beneficial interest in such shares which amounted to nothing more than the right to acquire a greater

equity to be received on termination of the trust, and not the right to acquire legal title to the shares. An additional group of shares issued to the trustees to be held as a reserve to meet the requirements of an employee's compensation plan was likewise held not to involve any transferred rights to receive stock, such shares being held for the benefit of the issuing corporation. Of the total additional shares delivered to the trustees, only the stock which incurred the additional transfer tax represented an exchange of stock with another bank. This transaction was held taxable as being in the nature of a true nominee arrangement.

The result reached in that case, we believe, is contrary to the broad principles laid down in the *Raybestos-Manhattan* and *Founders General* cases, *supra,* because the subscribers there actually furnished the consideration and were thereby entitled in the first instance to receive the stock only subject to the voting trust agreement, and the voting trust agreement recognized that they had a right to the stock since they actually did furnish the consideration. In any event, that case, we think, is distinguishable from the present case. There the decision seems to have turned primarily on the fact that the warrants entitled the subscribers to subscribe for and receive only voting trust certificates. In the instant case, however, the resolution itself (R. 135–136) shows clearly that the subscribers were actually subscribing to the stock itself, merely subject to an arrangement to which they agreed

that the stock should be placed in the hands of voting trustees who were to issue voting trust certificates representing the subscribers' beneficial interests in the stock.

In view of the foregoing, we submit that the adverse findings and conclusions of the court below should be set aside, as contrary to the great weight of the evidence, and correct conclusions drawn by this Court to the end that the transfer by the subscribers to the taxpayer's stock of their rights to receive the 155,000 shares be held taxable within the meaning of the pertinent statute and regulations in harmony with controlling authority cited heretofore.

II

The stamp tax is payable in respect of the right to receive the voting trust certificates representing the taxpayer's capital stock

Prior to June 21, 1932 (the effective date of Section 723 of the Revenue Act of 1932, increasing the rate of tax to 4 cents per share), voting trust certificates for 10,000 shares of the taxpayer's treasury stock (which were included in and represented by stock certificate No. 7 for 505,000 shares issued to the trustees of the voting trust on April 5, 1932), and also voting trust certificates for 120,445 shares of the taxpayer's new stock were issued to various individuals. These individuals had not deposited any of the shares represented by the voting trust certificates with the trustees of the voting trust. The 10,000 shares of treasury stock were part of

the 249,996 shares donated back to the taxpayer on May 1, 1931, by C. R. Griffith, when he surrendered stock certificate No. 1 for cancellation, and were deposited by the taxpayer with the trustees on September 22, 1931, on which date stock certificate No. 6, which included these shares, was issued by the taxpayer to the trustees for 349,996 shares. The 120,445 other (new) shares—not treasury shares—likewise were shares which had not been deposited with the trustees by the persons to whom the voting trust certificates therefor had been issued.

The Commissioner of Internal Revenue taxed these transactions, as transfers of the right to receive voting trust certificates representing the taxpayer's stock, at the rate of two cents per share, the tax thereon amounting in the aggregate to $2,608.91.

Subsequent to June 21, 1932, voting trust certificates for 1,640 shares were also issued to persons who had not deposited the shares represented by those certificates with the trustees of the voting trust. The Commissioner taxed these transactions, as transfers to the recipients of the voting trust certificates of the right to receive such certificates representing the taxpayer's stock, at the rate of four cents per share, the tax amounting to $65.60.

The court below held while the statute levied a tax in respect of the transfer of voting trust certificates, it did not levy one in respect of the right to receive such certificates, and therefore, on the au-

thority of *Corporation of America* v. *McLaughlin, supra,* allowed recovery of the taxes ($2,674.51) paid on these transfers (R. 85–86).

We submit that the decision of the court below is in error in holding the transfer of the right to receive the voting trust certificates representing the taxpayer's stock is not taxable.

The Treasury Department has consistently held that transfers of voting trust certificates and transfers of the right to receive such certificates are taxable inasmuch as they carry all the rights of the stock, except the voting power, including the right to receive the stock upon dissolution of the voting trust, as herein. Article 34, Regulations 71, *infra;* Article 12 (as amended, July 24, 1924, by T. D. 3620, III–2 Cum. Bull. 396, providing that the sale or transfer of certificates or shares representing the beneficial interests in an association, or in an operating business trust, is subject to tax) and Article 33 (1) (f) of Regulations 40; G. C. M. 11693 XII–1 Cum. Bull. 430. We think the Treasury Department's position therein is sound and has been justified under the statute as broadly and liberally interpreted by the Supreme Court in the *Raybestos-Manhattan* and *Founders General Co.* cases, *supra.*

In the *Raybestos-Manhattan Co.* case, the Supreme Court stated (pp. 62–63):

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a share-

> holder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. See *Provost* v. *United States,* 269 U. S. 443, 458, 459, 46 S. Ct. 152, L. Ed. 352. While the statute speaks of transfers, it does not require that the transfers shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. * * * It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation.
>
> The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares of certificates whether made upon the books of the corporation "or by any paper, agreement, or memorandum or other evidence of transfer * * *."

Under the rules laid down by that decision, the subject of the tax embraces the right to receive any certificate or interest in the taxpayer's property and the transfer of rights to subscribe for or receive shares or certificates, whether made upon the books of the taxpayer corporation or by any other evidence of the transfer. It is immaterial, therefore, we submit, whether or not the issues and transfers are shown herein by the taxpayer's records.

While the question before the court in the *Raybestos* case was not the taxability of the transfer of

the right to receive voting trust certificates, the above-quoted language of the court, clearly not *dicta*, marks out the extensive limitations of the statute sufficiently to warrant the imposition of the tax on the transfers of the right to receive the voting trust certificates herein. Cf. *Standard Oil Co. of California* v. *United States,* 90 F. (2d) 571 (C. C. A. 9th), wherein this Court, on the authority of the *Raybestos-Manhattan* and *Founders General Co.* cases, held taxable the transfer of the right to receive the stock when the issuance thereof was direct to the stockholders and not to the corporation entitled to receive it.

It is therefore submitted that the stamp tax is payable in respect of the transfer of the right to receive the voting trust certificates representing the taxpayer's stock.

III

The granting of the options to purchase the taxpayer's stock is subject to the stamp tax

At an adjourned meeting held January 27, 1932 (R. 181), the taxpayer's board of directors passed a resolution giving options expiring July 31, 1932, to Paul Stock, E. W. Battleson, and Franklin T. Griffith to purchase 35,000 shares of its capital stock in consideration for their having made large cash loans to the taxpayer (R. 102–104, 119–121, 128–132, 139–140, 141–142). The options thus granted were not exercised prior to July 31, 1932, the expiration date thereof (R. 104, 119–120, 138, 199–200), but the option holders "unquestion-

ably * * * had the right to do it" (R. 139). The Commissioner assessed against the taxpayer $1,400 stamp taxes upon the theory that these options constituted "agreements to sell" stock within the meaning of Section 800, Schedule A–3 of the 1926 Act, *infra.* The tax was assessed thereon at the rate of four cents per share on 35,000 shares under Section 723 of the 1932 Act, *infra* (R. 180), for the reason that the period of the options did not expire until July 31, 1932, that is, subsequent to the effective date of the 1932 Act.

The court below held that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option; that the statute does not use the word "options'; that Congress would have used it had it intended to tax the grant of options (R. 86); and therefore it allowed recovery of the $1,400 tax paid on this transaction (R. 106–107).

We submit that the options, whether exercised or not, constituted "agreements to sell," as provided by the statute. Section 800, Schedule A–3, Revenue Act of 1926, *infra;* Section 723, Revenue Act of 1932, *infra.* The interpretative regulations define "agreements to sell" to include both "options" and "calls." Article 77 (2) (b), Regulations 71, *infra.*

Apropos of this, we do not think any valid distinction can be made between the principles announced by the Supreme Court in *Treat* v. *White,* 181 U. S. 264, and those involved in the instant case. The court there held a "call" taxable as an

"agreement to sell" stock, under paragraph 1, Schedule A, Section 25, of the Revenue Act of June 13, 1899. It cited examples of "calls" as represented by various instruments, of which the following is typical (pp. 264–265):

EXHIBIT A

NEW YORK, *May 18th, 1899.*

> For value received the bearer may call on me on one day's notice, except last day, when notice is not required. One hundred shares of the common stock of the American Sugar Refining Company at one hundred and seventy-five percent at any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock. Expires June 2, 1899, at 3 p. m.
>
> (Signed) S. V. WHITE.

In that case, the tax had been levied on approximately 30,000 shares of stock subject to instruments similar to the one above quoted as "agreements to sell" stock. None of the 30,000 shares had actually ever been "called." The Circuit Court of Appeals for the Second Circuit certified the following question to the Supreme Court (p. 265):

> Is the above memorandum in writing, designated as Exhibit A, an "agreement to sell" under the provisions of Section 25, Schedule A, act of Congress approved June 13, 1898, and, as such, taxable?

The act referred to imposed a tax "on all sales, or agreements to sell, * * *." The Supreme

Court, referring to a "call," adopted the following definition (p. 266):

> It is an agreement, and manifestly an "agreement to sell." It may be referred to as an "offer," or an "option," or a "call," or what not, but it is susceptible of no more exact definition than "an agreement to sell." Inasmuch, therefore, as the statute requires stamps to be affixed "on all sales or agreements to sell," it would seem that these "calls" are within its provisions.

The Court further stated (pp. 266–267):

> * * * "Calls" are not distributed as mere advertisements of what the owner of the property described therein is willing to do. They are sold, and in parting with them the vendor receives what to him is satisfactory consideration. Having parted for value received with that promise, it is a contract binding on him, and such a contract is neither more nor less than an agreement to sell and deliver at the time named the property described in the instrument. It may be a unilateral contract. So are many contracts. On the face of this instrument there is an absolute promise on the part of the promisor and a promise to sell. We cannot doubt the conclusion of the circuit judge that this is in its terms, its essence, and its nature an agreement to sell. Therefore, it comes within the letter of the statute.

It will be observed, therefore, that the Supreme Court defined both calls and options as agreements to sell. This should be conclusive herein.

In the present case, as we interpret the facts, as soon as the resolution of January 27, 1932, was adopted, the taxpayer became absolutely obligated, at the election of the individuals named, at any time up to July 31, 1932, to sell the shares of stock referred to therein. This seems to be true, inasmuch as the options appear to have been given for sufficient consideration. It is apparent, therefore, that these options were taxable as "agreements to sell," as provided by the statute, and that therefore the court below was wrong in holding to the contrary.

It would seem, however, that the options are taxable at the rate of two cents a share, as provided by the Revenue Act of 1932, instead of four cents a share, as provided by the 1934 Act. They are taxable, of course, because they are binding agreements to sell. *Treat* v. *White, supra,* p. 266. It is apparent, therefore, that they became binding agreements to sell on January 27, 1932, prior to the effective date of Section 723 of the Revenue Act of 1932, and that therefore the rate of two cents a share is applicable as provided by Section 800, Schedule A–3 of the Revenue Act of 1926, which was then in force. It would seem to make no difference that the option period did not expire until

after the 1932 provision, referred to, became effective. Accordingly, it was stipulated in the court below that the taxpayer was entitled to at least the sum of $700 thereof (R. 104).

CONCLUSION

It is submitted that the judgment of the court below is erroneous and not in accordance with law. It should therefore be reversed by this Court and judgment entered for the appellant.

Respectfully submitted.

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September 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

Title VIII.—Stamp Taxes

Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax (U. S. C., Title 26, Secs. 900, 908).

* * * * *

SCHEDULE A.—STAMP TAXES

* * * * *

3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of

profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share. * * *

Revenue Act of 1932, 209, 47 Stat. 169:

SEC. 723. STAMP TAX ON TRANSFER OF STOCKS, ETC.

(a) Subdivision 3 of Schedule A of Title VIII of the Revenue Act of 1926 is amended to read as follows:

"3. Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued), 4 cents,

and where such shares or certificates are without par or face value, the tax shall be 4 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be): * * *." (U. S. C., Title 26, Secs. 902, 921.)

Treasury Regulations 71, promulgated under the Revenue Act of 1926:

ART. 31. *Basis of tax.*—Sales or transfers of stock, either before or after issuance of a certificate, or of rights to subscribe for or to receive such stock, are taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, stock, or to the right to subscribe for or to receive such stock, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

As used in this chapter, the term "sale" or "transfer" includes any of the transactions or dealings in stock, or in rights to subscribe for or to receive stock, which are subject to the tax imposed under Schedule A–3, except where from the context it is clear that a different meaning is intended. As to the use of the term "stock," see article 25.

ART. 32. *Rate of taxation.*—(a) In the case of stock having a par or face value, the amount of the tax is 4 cents on each $100 or faction thereof of the total par or face value of the certificates (or of the shares where no certificates were issued) involved in the sale or transfer, whether such aggregate par or face value is greater or less than $100; e. g., where the total par or face value of the certificate involved in the transaction is $100

or less, the tax is 4 cents; where such value is in excess of $100, the tax is 4 cents on each $100 or fraction thereof.

(b) In the case of shares without par or face value, the tax is 4 cents on the sale or transfer of each share.

(c) However, in the case of a sale of stock, whether with or without par or face value, when the selling price is $20 or more per share, the rate is 5 cents instead of 4 cents.

Art. 33. *Computation of the tax.*—(a) In the case of stock having par or face value, the amount of the tax is computed upon par or face value and not upon the amount that may have been paid in on the stock; e. g., where stock of the par value of $100 is sold or transferred, for which only $25 is paid, the tax is reckoned upon the par value of $100 and not upon the $25 paid.

(b) Where one certificate represents several shares (however large the number of shares) the tax on the sale or transfer of such certificate is computed upon the par or face value of the certificate and not upon the par or face value of each separate share; e. g., on the transfer of 1 certificate representing 500 shares, par value $5, the face value of the certificate being $2,500, the stamp tax is $1. Where shares are not represented by certificates, the tax is computed upon the par or face value of each share.

(c) In the case of stock without par or face value, the tax is computed on each share; e. g., the tax on the sale or transfer of a certificate for 20 shares of such stock is 80 cents.

(d) However, in the case of a sale of stock, whether with or without par or face value, when the selling price is $20 or more

per share, the rate is 5 cents instead of 4 cents; in other respects the tax is computed in the same manner as shown in paragraph (b) or (c).

ART. 34. *Sales and Transfers subject to tax.*—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

(d) The transfer of voting trust certificates.

(e) The sale or transfer of temporary or interim certificates of stock.

(f) The sale or transfer of certificates or shares representing beneficial interests in an association. See Article 77 (1) (e)—"Association."

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

(i) The transfer of the right to receive a stock dividend already declared.

(j) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(k) The sale of or agreement to sell shares of stocks made by a broker, directly or indirectly, for himself.

(l) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(m) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(n) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(o) The transfer of certificates of stock by an administrator or executor to the legatee or distributee.

(p) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(q) The sale, transfer, or delivery, within the territorial jurisdiction of the United State, of shares of stock of a foreign corporation.

(r) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(s) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation is a transfer by the act of the parties, and not wholly by operation of law.

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

(v) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(w) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

* * * * *

Art. 77. *Further definitions.* * * *

(2) As used under Schedule A 2 and 3 of the Revenue Act of 1926:

* * * * *

(b) The term "agreement to sell" includes options, calls in "puts and calls," offers, indemnities, and priviliges, and contracts, either in writing or by parol, to sell on the deferred or partial payment plan; * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 9197

13

In the United States Circuit Court of Appeals for the Ninth Circuit

J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, appellant

vs.

Portland Associates, Inc., a Corporation appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

Brief For the Appellee

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9197

J. W. Maloney, Collector of Internal Revenue, Portland, Oregon, appellant

vs.

Portland Associates, Inc., a Corporation appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLEE

This appeal has been taken from a judgment entered January 7, 1939, in favor of the Appellee and against the Appellant to recover documentary stamp taxes assessed and paid. Said judgment is in the amount of $7,282.48, together with interest thereon at the rate of 6 per cent per annum from November 2, 1935, together with the further sum of $1,407.90, together with interest thereon at the rate of 6 per cent per annum from February 16, 1937, together with costs and disbursements in the amount of $31.06 (R. 108-109).

The Appellee does not entirely agree with the statements of the Appellant relative to the "questions presented" set forth on page 2 of Appellant's brief. We suggest the following statement as to the questions presented:

QUESTIONS PRESENTED

1. Whether or not there is a transfer of legal title to shares or certificates when voting trust certificates are purchased directly from voting trustees where no previous subscription or purchase or ownership was had of the capital stock and whether or not such a transaction results in a taxable transfer.

2. Whether or not there is any transfer of the right to receive voting trust certificates which would be taxable under the revenue statutes.

3. Whether or not there were options to purchase and if so, whether or not the same is taxable under the revenue statutes.

STATUTES AND REGULATIONS INVOLVED

Appellant has included as an appendix to his brief certain statutes and regulations but inasmuch as all of the statutes and all of the regulations which have reference to this matter are not included in Appellant's brief, we are including as an appendix to this brief those statutes and regulations which we believe to be applicable.

By stipulation (R 164-165) the 1926 Print of Regulations 71 of the Treasury Department may be accepted by the Court in the event any reference thereto is necessary.

STATEMENT

The facts as found by the Court below (R 89-105) substantially set forth all of the facts necessary for this controversy.

SUMMARY OF ARGUMENT

1. Appellant's first contention is that there was a transfer of the right to receive the legal title to 155,000 shares of the taxpayer's corporate stock which tax was assessed in the amount of $3,100.00. The 155,000 shares are included within stock certificate No. 7 issued by the corporation to the voting trustees. Counsel for Appellant contend that in effect there was an implied issuance of this capital stock to the individuals who paid money for voting trust certificates and that such individuals impliedly transferred the shares of stock to the voting trustees.

The Appellee contends that such was not the arrangement between the parties, but that certain individuals purchased voting trust certificates from the voting trustees, and that the purchasers of voting trust certificates at no time had the right to receive the *legal title* to *shares of stock* in the corporation, except such right as they might have upon the termination of the trust, but any rights they had to receive the stock at the termination of the trust were not transferred to anyone. Such rights were always retained by the trust certificate holder as shown by the voting trust certificates and the voting trust agreement.

2. The Appellant contends that there was a transfer of the right to receive voting trust certificates which Appellant claims would be taxable.

The Appellee claims that there was no transfer of the right to receive voting trust certificates and even if there was a transfer of the right to receive voting trust certificates that such a transfer is not taxable under the revenue statute.

3. The Appellant contends that the Court below erred in holding that the purported options were not taxable.

The Appellee contends that the purported options do not rise to the dignity of being options, and even if they are options, they are not taxable under the revenue statute.

ARGUMENT

I.

There was no transfer of rights to subscribe for or receive the taxpayer's capital stock, when individuals purchased trust certificates from the voting trustees, and that there was no taxable transfer within the meaning of Schedule A-3 Title VIII *Revenue Act of* 1926 *as amended.*

Appellant's argument is premised upon facts which are contrary to what the record shows. On page 21 of Appellant's brief it is recited that "155,000 shares of the new no par value stock were subscribed for by various individuals." This is not in accordance with

the facts shown in the record. This same statement is mentioned on pages 22 and 24 of Appellant's brief.

In attempting to decide this case and with particular reference to the cases cited by the Appellant, the following points of importance should be kept in mind by the Court:

1. With relation to the voting trust agreement there was no consolidation of corporations or of corporate interests in connection with the formation of the voting trust agreement.

2. That the tax in this case is assessed only against the corporation. It is not assessed against the voting trustees, or against the Title and Trust Company as the agent of the voting trustees, and it is not assessed against any of the individual holders of voting trust certificates. (Defendant's Exhibits, 15, 16, 17, 18 and 19).

3. That capital stock in the corporation with respect to the 155,000 shares was never issued to any holders of the voting trust certificates but was only issued to the voting trustees and the original issuance tax paid. (R. 118, 137, 142, 144, 145, 146, 161, 163, 172, 184, 185).

4. That the corporation was not a party to the voting trust agreement. (Plaintiff's Exhibit 4-R. 187).

5. That the holders of the voting trust certificates did not subscribe for or purchase stock in the corporation but only purchased voting trust certificates (R. 134).

6. That the consideration for the purchase of said voting trust certificates was not paid to the corporation by the purchaser of voting trust certificates, but was paid to the voting trustees (R. 126, 136).

7. That no voting trust certificates were issued by the corporation but were issued only by the voting trustees, or by the Title and Trust Company as agent of the voting trustees (R. 114, 126, 127, 134, 136, 142, 144).

It should be kept in mind also by the Court that Schedule A3 of Title VIII of the Revenue Act of 1926, as amended, imposes a tax only upon the transfer of *legal title,* to any of the shares or certificates mentioned or described in sub-dibision (2). Sub-division 2 is known as Schedule A-2 of Title VIII of the said Revenue Act which is limited to shares or certificates of stock or of profits or of interest in property or accumulations by any corporation or by any investment trust or similar organization. The voting trustees in this instance did not come within the category of either a corporation or an investment trust, but in any event, this tax was not levied upon the voting trustees.

With respect to the 155,000 shares the record clearly shows that they were issued to the voting trustees and that no actual stock subscription in writing was taken by the corporation from the voting trustees or from any other person. A majority of the outstanding capital stock had been previously subscribed for and issued and the stamp taxes have been paid thereon,

but the 155,000 shares of stock were issued to the voting trustees upon the payment by the voting trustees of the amount required by the corporation to issue the same in accordance with the corporate resolutions. The voting trustees did not sell the shares of stock but they sold to prospective purchasers only voting trust certificates.

The fundamental facts in this case differ very greatly from those cases relied upon and cited by the Appellant.

The case of Raybestos-Manhattan, Inc., vs. U. S. 296 U. S. 60, did not even involve voting trust certificates but the transaction arose by reason of a consolidation of corporations and the court was unquestionably correct in holding that upon the consolidation there was a transfer of the right to subscribe for or receive shares or certificates of stock from the corporation.

In the case of Welch vs. Kerckhoff 84 Fed. (2d) 295, there was a transfer by an executor to a residuary legatee which was clearly a transfer of *legal title.*

Appellant apparently places great emphasis upon the case of Founders General Corporation vs. Hoey 300 U. S. 268. In that case there was a designation of a nominee to receive the stock which was to be issued. The Court pointed out that the nominee received no beneficial interest in the stock but nevertheless did receive the *legal title.* We believe the Court was correct in deciding that such a transfer was taxable under the statute.

In the case of Standard Oil Company of California vs. United States, 90, Fed. (2d), 571, there was a transfer of the right to receive stock in the corporation, upon a consolidation. No voting trust was involved.

The case of Burnett vs. Harmel, 287 U. S. 103, did not pertain in any way to stamp taxes and had no reference to the statutes involved in this case. The same is true of the case of New Colonial Ice Company vs. Helvering, 292 U. S. 435.

The cases of Consolidated Automatic Merchandising Corporations, 90 Fed. (2d) 598; United States vs. Vortex Company, 84 Fed. (2d) 925, and United States vs. Brown Fence and Wire Company 9 F. Supp. 1008, all declare the proper rule of there being a taxable transfer upon a consolidation of corporations. None of the aforementioned cases have any bearing upon the issues involved in this case, because the facts and issues were substantially different. In the first case, the corporation was also a party to the voting trust agreement.

The case of Ladner vs. Pennroad Corporation, 97 Fed. (2d) 10, did involve the issuance and transfer of voting trust certificates but in that case the subscribers or purchasers paid their money directly to the corporation which was the issuer of capital stock. In that case they did not purchase voting trust certificates from voting trustees as they did in the case at bar. In the opinion of the Court it was specifically pointed out as follows: "It will be noted that the

subscribers sent checks for the stock to the *Appellee* * * *"

It is obvious that when the purchasers or subscribers sent money to the corporation for *capital stock* they then became entitled to receive capital stock and the right to receive the capital stock was immediately transferred to the voting trustees. It is equally obvious that there would be no transfer of the right to receive if the voting trustees subscribed for or purchased the stock from the corporation and then sold only voting trust certificates.

In the case of United States vs. Baker (C.C.A. First Circuit), decided March 25, 1939, not reported, but which may be found in Commerce Clearing House 1939 Federal Tax Service, Volume 4, Page 9988, Paragraph 9423, there was not only the payment of money to the issuing corporation but there was an actual issuance of voting trust certificates by the voting trust to the corporation and the corporation subsequently sold the voting trust certificates which merely resulted in a transfer of voting trust certificates. The Appellee here does not contend that there is no tax upon a transfer of voting trust certificates. In fact the tax was assessed on many transfers of voting trust certificates which the taxpayer in this instance has acknowledged (R. 18, 19, 20, 21, 24). In the Baker case there was formed an investment trust which issued shares of stock. There was also created a common voting trust. The investment trust authorized the issuance of shares of stock to the

voting trustees in consideration of the issuance by the voting trustees to the investment trust of an equal number of shares represented by voting trust certificates. The investment trust authorized the issuance and transfer of voting trust certificates which it had acquired in the name of any purchaser of voting trust certificates which were sold to the public by the investment trust. It is specifically pointed out in the facts in that case that "on various days between April 9, 1927, and December, 1930, the investment trust, Plaintiff herein, exchanged their property or offered for sale and sold to the public, or numerous purchasers thereof for money, not less than 1,779,972 common shares of the voting trust. The voting trust certificates then sold by the investment trust were delivered to the voting trustees and were cancelled and new certificates were issued in the names of the purchasers. The Court pointed out that the only issue before it was whether or not the sale of the voting trust certificates by the investment trust to the public was a transfer, subject to the stamp tax. In its opinion the Court gave consideration to the case of White vs. Consolidated Equities, Inc., 78 Fed. (2d) 435, and did not attempt to overrule the decision, but merely pointed out the distinction. It also emphasizes that each case must depend on its own facts. With relation to the White case, the Court stated:

> "In the White case there was only one completed transaction in the way of a sale or transfer, and the corporation having paid the tax

> on that sale or transfer, it was under no obligation to pay a second tax; and, having been required to do so, could recover it back. But in the present case there were two taxable transactions: One when Investment Trust transferred its stock to the Voting Trust and received in exchange therefor voting trust certificates, upon which transaction Investment Trust paid a tax. The second transaction was when Investment Trust sold and through its depository delivered Voting Trust certificates to purchasers, which sale, by reason of the voting trust agreement, transferred an equitable right or interest in the stock of Investment Trust in the hands of the Voting Trust. * * * This second transaction being a sale or transfer of an equitable interest in the Investment Trust, such sale was also the subject of a tax."

The revenue statutes providing for a documentary stamp tax upon the issue or sale of capital stock is a tax upon the use of facilities. The statutes may be found in U. S. C. A., Title 26, Section 902. The Appellee here concedes that whenever the facilities are used which would be taxable under the statute, that the tax should be paid, but if a transaction occurs which does not use the particular facilities upon which the tax is imposed, then there should be no assessment or collection of the tax. See Nicol vs. Ames, 173 U. S. 509, Knowlton vs. Moore, 178 U. S. 41, Thomas vs. United States, 192 U. S. 363 and Billings vs. United States, 232 U. S. 261.

It is also a cardinal principal of law that in the construction of any statute and the application of the same to the facts of any case, if there is any doubt, that doubt should be resolved in favor of the taxpayer. Gould vs. Gould, 245 U. S. 151, Miller vs. Standard Nut Margarine Company, 284 U. S. 498, McFeely vs. Commissioner of Internal Revenue, 296 U. S. 102, Cincinnati Soap Company vs. United States, 22 Fed. Sup. 141, Empire Trust Company vs. Hoey, Collector, 22 Fed. Sup. 366.

With the above rules of law in mind the Court will note that the tax on transfers, as shown by schedule A-3 of the Revenue Act of 1926 is a tax upon the sale, agreement of sale, memoranda of sale or delivery of or transfer of *legal title* to shares or certificates of stock. The statute also includes rights to subscribe for or to receive such shares or certificates. The words "such shares or certificates" undoubtedly refer to stock or to the transfer of *legal title* to shares or certificates of *stock*. The statute does not in any manner cover voting trust certificates, and it does not cover transactions which might have been contemplated but which were never made, and it does not cover sales or transfers of an equitable interest in stock, but plainly refers to *"legal title"*. Under the evidence in this case the purchasers of voting trust certificates did not purchase the *legal title* to shares or certificates of stock and they did not purchase the right to receive shares or certificates of *stock*, because all of the stock was subject to the voting trust agreement under the

terms of which legal title to the stock could not be sold or transferred by the voting trustees.

Counsel for Appellant in his brief attempts to emphasize that there was a transfer of the right to receive because the voting trust certificates entitled the holder thereof to receive the certificates of stock at the expiration of the voting trust (Appellant's brief 23, 24). Appellee concedes that if the voting trust agreement expired and the voting trust certificate holders desired to transfer their voting trust certificates for shares of stock there would be a transfer tax upon the transfer of stock from the voting trustees to the voting trust certificate holders. However, this transaction, as it here occurred, and even though the voting trust certificate holders had the right to receive stock at the expiration of the voting trust agreement, there was no transfer by the voting trust certificate holder to the voting trustees of the *right to receive* such stock. The *right to receive* any stock at the expiration of the voting trust agreement was a right which the voting trust certificate holder retained and did not transfer except when he transferred his voting trust certificate to some other person.

The erroneous tax in this instance, apparently results by reason of the fact that the original investigating field agents of the Commissioner of Internal Revenue either did not fully understand the facts of the transaction or did not fully understand the limitations of the Revenue Statutes. The investigating officers were Oscar B. Gingrich whom the evidence

shows is now deceased and L. D. Courtright. The Defendant did not account for Mr. Courtright except by the statement that they did not know where he is, but offered no testimony to show that they had made any effort to locate him or have him appear as a witness before the court either in person or by deposition (R. 187, 188). Plaintiff's Exhibit 20 is a copy of the report made by these investigating officers and with relation to the 155,000 shares they reported to the Commissioner that "an additional 155,000 shares were transferred to the voting trust making a total of 505,000 shares held by the Trustees." The Commissioner examining such a report would undoubtedly come to the conclusion that there was a *transfer of shares* to the voting trust and a tax would necessarily be assessed upon such a statement. However, the actual facts of the transaction disclose that the statement of the field agents in their report, was not true but that there was only an *issuance* of the additional 155,000 shares to the voting trust (upon which an issuance tax has been paid), but that there was no *transfer* of these shares to the voting trust.

Under the facts before the Court in this case there have been only two cases decided which have a bearing upon facts similar to those of this case, where voting trust certificates were sold by voting trustees, as distinguished from a transaction where *shares of stock* have been *issued* and then *transferred* to voting trustees. The first of these cases is Consolidated Equities, Inc., vs. White, 7 Fed. Supp. 851, first de-

cided in the District Court of Massachusetts. The opinion, being very brief, is as follows:

> "The Plaintiff paid a stamp tax on alleged transfer of shares in corporations whose liabilities it had assumed which it now seeks to recover as unlawfully exacted. The occasion for the asserted tax is due to transactions of which the following summary may be said to be typical:
>
> Brokers offered for sale voting trust certificates representing shares in an investment corporation at a stated price. A customer electing to purchase sent the purchase price to the broker who, in turn, paid it to the corporation, whereupon the corporation issued shares to voting trustees who thereupon instructed the transfer agent to issue to the purchaser voting trust certificates for the number of shares purchased and paid for. The stamp tax on the issue was paid, as also were stamp taxes on transfers where the voting trust certificate was originally issued to the broker and later divided among its customers. The details of the transactions are more fully set forth in requests for findings.
>
> It is obvious that what the customer of the broker purchased and what he received was a certificate representing a beneficial interest in stock which had been originally issued to voting trustees to hold for the benefit of the subscriber. This transaction involved no transfer of legal title to the shares, nor to any right to such legal title either from purchasers to

trustees or from trustees to purchasers. If the theory of the government that the purchaser became a shareholder by virtue of his payment to the broker of the purchase price be adopted, the voting trustees held the stock for the sole benefit of the purchaser and purchaser's interest was represented, and intended to be represented, by the voting trust certificate. No transfer, actual or constructive, from the purchaser was necessary to vest the legal title in the voting trustees. Union Trust Co. of Pittsburgh vs. Heiner (D. C.) 26 F. (2d) 391.

I rule, therefore, that the transfer tax was unlawfully exacted, and that the Plaintiff is entitled to recover in this action.

Judgment for the Plaintiff may be entered for $6,674.88, with interest thereon."

This case was appealed to the Circuit Court of Appeals for the First Circuit and reported as White vs. Consolidated Equities, 78 Fed. (2d) 435.

The Court in its decision on appeal pointed out as follows:

"All the transactions appear to have been made upon form contracts which appear in the record. These contracts and the recitals of fact in the bill of exceptions fully support the findings and rulings of the District Judge. He found, on the collector's request, that the brokers 'entered into an agreement with the voting trustees and United Equities, Inc. (one of the corporations concerned) to secure subscriptions for voting-trust certificates, repre-

senting shares of United Equities, Inc., at the price of $100 per share' (italics supplied); and that the brokers 'proceeded to obtain subscriptions for voting-trust certificates.' The facts stated show that the purchasers did not come into contact with the corporations and made no contracts representing these shares except through the brokers. It is true, as the collector contends, that in matters of this sort the statute required that substance rather than form shall be considered, and that 'all transfers of legal title to shares or certificates whether technical sales or not' are taxable (Provost vs. U. S., 269 U. S. 443, 458, 46 S. Ct. 152, 155, 70 L. Ed. 352; Goodyear Co., vs. U. S., 273 U. S. 100, 47 S. Ct., 263, 71 L. Ed. 558); but this does not warrant imputing to transactions a character substantially different from what they in fact were in order to make them taxable. In the cases relied on by the collector there was an acquisition of the shares, or of the right to them, by the purchaser which was transferred to other parties. Consolidated Equities vs. White (D. C.) 9 F. Supp. 145. Each case depends on its own facts. In the one before us the purchasers did not contract for the shares and consequently never transferred them or any right to them. See Shreveport-El Dorado Pipe Line Co. vs. McGrawl (C. C. A.) 63 F. (2d) 202; Union Trust Co. vs. Heiner (D. C.) 26 F. (2d) 391. The judgment of the District Court is affirmed with costs."

The other case is Corporation of America vs. McLaughlin, decided by this Court on November 22, 1938, 100 Fed. (2d) 72. In that case the Court pointed out that the purchasers had no opportunity to subscribe for the stock but only had a right to subscribe to a beneficial interest and they could not have acquired a right to anything else and that they were never offered the right to pay for the stock and have it issued to them. The Court, in its opinion, stated:

> "It is apparent that the beneficiaries of the trust of the corporation's shares were offered nothing more than the right to acquire more equities and not the right to acquire the legal title to stock which they in turn transferred to the trustees. True, the beneficiary's payment of the consideration is a sine qua non of the transaction, but the causa causans, the generating cause, of taxability—the existence of a right in the payer of the consideration to receve the stock and its subsequent transfer—here did not exist***
>
> "Very frankly the subscribers were told, that Giannini had created a status in which 'the payment of your consideration gives you nothing but a right to obtain, in the future, certain stock of the corporation which cannot be exercised by you until the Giannini trust is dissolved.' It seems clear that this is a case where the commissioner is claiming a tax on a transfer from the beneficiary of a right to receive shares of stock, where the beneficiary

came into such a right only through the trust and still has the right to receive them.

"The words of the statute taxing 'transfers of the legal title *** to rights *** to subscribe for or to receive shares' of a corporation cannot be interpreted to mean creation of an equitable right to receive shares at the termination of a trust in which they are held, with the deliberate intent that the beneficiaries shall not receive them until the trust is terminated. There appears no ambiguity in the statute from which any other interpretation may be chosen. If there were such an ambiguity White vs. Aronson, 302 U. S. 16, 20, 58 S. Ct. 95, 82 L. Ed. 20, requires its determination in favor of the taxpayer."

The Appellee in this case also contends that the corporation against which the tax was assessed was not a party to the voting trust agreement and had no part in the issuance or transfer of voting trust certificates. The voting trust was entirely separate from the corporation, and the voting trustees or their agents made their own contacts with the trust certificate holders and issued its own voting trust certificates through the medium of its own agent, Title and Trust Company of Portland. It is the further contention of the Appellee that even though the statutes were broad enough to include a tax upon the transfer of the right to receive a beneficial interest, such a tax could not be imposed upon the corporation who had no part in the issuance or transfer of voting trust certificates,

but such a tax could only be imposed upon either the voting trustees or upon the purchasers or holders of voting trust certificates. A tax can not be collected from a person or corporation who had no part in the transaction. This was emphasized in the case of United States vs. Revere Copper and Brass Company, United States Disrtict Court, Northern District, New York, decided February 4, 1938, (not reported) but may be found in Commerce Clearing House Federal Tax Service for 1938, Volume 4, Page 9622, Paragraph 9173 where the United States was attempting to collect, through the medium of the Court, a tax on the transfer of certain capital stock from one stockholder to another by transfers in which the corporation had no part. The Court held that the tax could not be imposed upon the corporation unless it had some part in the transfer.

In view of the foregoing we submit that the findings of fact and conclusions of law of the District Court in this case were in conformity with the evidence and that there was a correct application of the statutes as construed by the decisions and that there was no taxable transfer on the 155,000 shares, and that no such tax could be imposed on the corporation.

II.

A stamp tax is not payable upon an original issue of voting trust certificates and is not payable in respect of the right to receive voting trust certificates.

It appears that the Appellant does not cover in his brief all of the items which were at issue before the District Court or upon which the District Court made findings. We are assuming, therefore, that the Appellant is only raising questions on appeal on the three items discussed in his brief.

The second item in Appellant's brief pertains to what he terms a transfer of the right to receive voting trust certificates. This specifically refers to items 14 and 15 shown in the analysis attached to Plaintiff's complaint (R. 10). It is further set forth in Plaintiff's complaint in the analysis of voting trust certificates (R. 14-24), being specifically those certificates which are designated in the trust certificate books as "original issue." Prior to June 21, 1932, the tax was computed at the rate of two cents under the 1926 Act and thereafter at the rate of four cents under the rate provided by the 1932 amendment. The original investigating officers in their report to the commissioner (Plaintiff's Exhibit 20), did not specifically recite any facts relative to these certificates but merely made the statement upon which the commissioner assessed his tax that "to date there has been transferred to the trustees 505,000 shares, and there has been issued trust certificates amounting to 496,-

787 shares." The transfer to the trustees of the original 349,995 shares was taxed at $70.00. There is no dispute over that tax. The additional 155,000 shares were never transferred to the trustees; they were *issued* to the trustees and have been discussed heretofore. In addition to these taxes which were paid on the issuance, the commissioner has taxed each individual voting trust certificate at the rate in effect at the time of the issuance of each certificate. This is directly contrary to the statute and regulations. The statute makes no mention of any tax upon the original issuance of voting trust certificates and under regulations 71, Article 29, sub-division (e) it is proclaimed that the issue of voting trust certificates is not subject to tax. The reason for such a regulation is obvious in view of the fact that the statute only attempts to place a tax upon the transfer of *legal tile* as distinguished from the *equitable title.* The Appellee here claims that the additional tax assessed on each of the certificates which are designated as "original issue" in the records of the voting trust certificates should be refunded to the Appellee. Part of the tax on original issues has been refunded, to-wit: On certificates Nos. 294 to 314, inclusive, and certificates 228 to 334, inclusive. In fact the commissioner, in his letter to Portland Associates, Inc., dated February 18, 1937, and the explanations attached thereto (Defendant's Exhibit 13), shows with relation to said item 14 that this was a "tax assessed with respect to the original issue of voting trust certificates. The original issue

of voting trust certificates is not taxable (Article 29 (e), Regulations 71). In other words, the commissioner recognized that the amount should have been refunded and he did refund a part thereof but failed to make a refund on the additional amount which was collected on account of original issues of voting trust certificates.

The Counsel for Appellant in his brief claims that this tax is based upon the right to receive voting trust certificates. He admits on Page 37 of his brief that these individuals had not deposited with the trustees of the voting trust, any of the shares represented by the voting trust certificates. This is obviously another attempt on the part of the Appellant to try to make, for the parties herein, a transaction which was entirely different from what actually transpired. In other words, the tax is being based upon a theoretical transaction, which the commissioner probably hoped had taken place, or that the commissioner is attempting to suggest that the transaction should have been handled in accordance with his theoretical transaction. We know of no decisions in American Courts which undertake to tell individuals how their transactions should be made so long as one does not act in violation of the laws or regulations of the constituted authorities. In this instance the commissioner is attempting to *theoretically make* a transaction whereby a tax would be imposed three times where there was only one taxable transaction. The only taxable transaction, so far as this corporation is con-

cerned was the issuance of the capital stock to the voting trustees, upon which the tax has been paid. The commissioner would go further and attempt to say that there was a subsequent transaction on the right to receive stock (which has been heretofore discussed), and a further transaction on the right to receive voting trust certificates, neither of the latter having actually been in the minds of the parties at the time of the transactions, and neither of them having actually taken place. None of the parties were mislead by the simple transaction of the trustees receiving the capital stock and the selling and issuing of voting trust certificates to those persons who subscribed for or purchased voting trust certificates. The voting trust certificate holders knew what they were buying, and got what they bought, and under such a transaction there was no transfer of the right to receive voting trust certificates. See Corporation of America vs. McLaughlin, 100 Fed. (2d) 72.

If Congress had intended that there should be a transfer tax on the right to receive voting trust certificates they certainly would have taken occasion to include in the statute a specific provision covering the transfer of the right to receive the voting trust certificates. They did not do this but limited the statute very plainly to transfers of *legal title* to *shares* of *stock* in a corporation or some similar association. In addition to that, the corporation against which the tax is assessed in this instance had no part in the issuance of voting trust certficates and was

not a party to any of the transactions between the voting trustees and the holders of the voting trust certificates.

We therefore submit that there was no transfer of the right to receive voting trust certificates and even if there had been, that the revenue statutes do not impose any tax on the transfer of the *right* to *receive voting trust certificates* and that the District Court was correct in his findings and conclusion upon this point.

III.

That the giving of an option to purchase stock is not subject to stamp tax.

The so called options referred to in this case are found in Plaintiff's Exhibit 1, being the minute book of the corporation on pages 41 to 49, inclusive. They are merely recitations in the minutes of the corporation, that certain persons have the right to purchase certain amounts of capital stock on or before July 31, 1932. These resolutions were adopted on January 27, 1932, and a tax of four cents per share was assessed against the same but at the time of the trial the Appellant conceded that even if a tax could be assessed thereon, it would only be at the rate of two cents per share for the reason that the 1932 amendment had not been passed or become effective in January of 1932, and the Appellant concedes that the

Appellee is entitled to recover in any event on this item, the sum of $700.00 (R. 181).

In view of the fact that the only evidence of these purported options is a resolution in the minutes of the corporation, it is doubtful if they rise to the dignity of being options. In any event the testimony clearly shows that there was no money ever paid by the individuals mentioned in the resolutions on account of the stock mentioned in the resolutions (R. 120). The recitation was made in the minutes for the reason as explained by Mr. Franklin T. Griffith (R. 139) that no criticisms would result from the purchase of stock by those who might be considered as "insiders," the purpose of the resolution being merely to fix a purchase price on the stock which was the market price at that particular time. This merely indicated good faith on the part of those individuals in fixing a price equal to the price for which the stock could be purchased by anyone on the open market. It is further pointed out in the testimony that the loans made by individuals at about the same time were all subsequently repaid by the corporation (R. 14) and that no consideration was ever paid for the purported options and no stock or trust certificates were ever delivered to any of the individuals by reason of said resolution (R. 120, 142).

The Court below held that an option does not become an "agreement to sell" until the offer is accepted by the exercise of the option.

The transaction took place in the State of Oregon

and if these resolutions are to be considered options we feel they would be governed by the ordinary definitions and rulings relative to options, by the Oregon Supreme Court.

We submit that an option is merely an offer and does not ripen into a contract until the consideration is paid or the privilege is exercised. In other words, an option is nothing more than the right to exercise a privilege. 55 C. J. 107, Section 68, states as follows:

> "An option, as used in the law of sales, is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or on compliance with certain terms and conditions; or which gives to the owner of the property the right to sell or demand sale. It is also sometimes called a 'refusal,' or an 'unaccepted offer.' It is not a contract for the purchase or sale of property, and does not transfer, nor agree to transfer, any title to, or interest in, the subject matter to the optionee, but is merely a contract by which the owner of property gives the optionee the right or privilege of accepting the offer and buying the property on certain terms, provided he acts within the proper time and manner; and until the option is exercised the delivery of the goods to the optionee is a mere bailment."

The Appellant relies strongly upon the case of Treat vs. White 181 U. S. 264 which does not relate

to an option but relates to a "call." The Court will observe in that case that there was a definite executed agreement made in bearer form and signed by the party to be charged, which in effect was a negotiable instrument passing by delivery. It was not an option but a definite agreement to sell and it is significant that under Regulations 71, Article 35, Sub-division (p) it is specifically provided that "a 'call' is an agreement to sell and is taxable." An option, however, is not an agreement to sell. It is merely the right to exercise a privilege.

It appears that the courts have never had occasion to pass upon the taxability of an option, under the revenue statutes providing for documentary stamps on issues and transfers of capital stock. The reason no such cases have arisen is undoubtedly due to the fact that the statute makes no provision for the taxing of options and if Congress had desired to impose a tax upon options they certainly would have included a specific provision therefor, in the taxing statute.

However, the Supreme Court of Pennsylvania in the case of Hughes vs. Antill, 23 Pa. Supreme Court 290, 95 considered the subject of taxability of an option. From the record it appeared that on August 31, 1899, Harvey Antill and his wife executed in duplicate an option to sell coal to J. S. White, his heirs and assigns. J. S. White assigned and transferred the option. The Court said

> "Neither the contract nor the assignment belonged to the class of instruments which, by

> the act of Congress of June 13, 1898, required an internal revenue stamp. Such stamps were necessary only on instruments conveying an interest or title, while in the present case the contract vested and the assignment transferred no present interest or title, but merely a conditional right to demand a conveyance within the time limited."

Furthermore, in the case of Hopwood vs. McCausland, 120 Iowa 218, 94 N. W. 469, the Court said:

> "An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. Warvelle on Vendors (2d Ed.) Sec. 125."

The Supreme Court of Oregon has several times expressed itself on the question of options. In the case of Clarno vs. Grayson, 30 Or. 111, 123, 46 Pac. 426, the Court said:

> "But if the right acquired by the terms of the contract is simply a privilege or an option, or a right to acquire a right, or an interest in the subject-matter of the contract, it is then not a question of the forfeiture of any vested right in the property, or a divestiture of title, whether termed equitable or legal, but a question of the enforcement or non-enforcement of a stipulated personal right or privilege. The privilege of acquiring a vested equitable right

must be distinguished from the right. The privilege is acquired directly by the contract, but the acquisition of the right, while it is stipulated for under its terms, is dependent upon the performance of a condition. When such a condition is performed, the right vests, and not until then: Richardson vs. Hardwick, 106 U. S. 254 (1 Sup. Ct. 213)."

Also, in the case of Kingsley vs. Kressly, 60 Or. 167, 173, 111 Pac. 385, 118 Pac. 678, the Court said:

"1, 2. The contract by its terms is an option. For the consideration of $2,000 paid, plaintiff granted to defendants, until April 15, 1909, the exclusive and irrevocable privilege to purchase the land. It was unilateral until accepted by defendants on that day. Until then they were in no way obligated to buy, and it was not a contract of sale. Plaintiff was bound by his offer, during the time specified, that he was not at liberty to withdraw it; there being a consideration paid for it. It is true the $2,000 was to constitute a part of the purchase price, if the sale was completed, but that sum was plaintiff's money in either case. But, to have the option culminate in a contract of sale, defendants must have accepted it within the time specified, and the acceptance was to be evidenced by the payment of the $18,000 on April 15, 1909. House vs. Jackson, 24 Or. 89 (32 Pac. 1027); Clarno vs. Grayson, 30 Or. 111; 120 (46 Pac. 426); Friendly vs. Elwert, 57, Or. 599 (112 Pac. 1065). Until that should be done, defendants would acquire no right

> in the property, except that if they entered into possession they would not be trespassers while they complied with the conditions of the agreement. Their right to possession was no more than a contingent license."

In the case of Leadbetter vs. Price, 103 Or. 222, 234, 202 Pac. 104, the Court had under consideration certain options relative to corporation stock. In its opinion the Court said:

> "To turn the option contract of April 1, 1910, into a contract binding Pittock to sell and Leadbetter to buy, it was incumbent upon Leadbetter to make a timely election to buy: James on Option Contracts, Secs. 801, 813; Pollock vs. Brookover, 60 W. Va. 75 (53 S. E. 795, 6 L. R. A. (N. S.) 403, and case note).
>
> "Election by the optionee must strictly conform to the terms of the offer contained in the option and must be unequivocal, absolute and unconditional; Friendly vs. Elwert, 57 Or. 599, 610 (105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913 A, 357); James on Options, Sec. 837.
>
> "It is only after the optionee has made an election under the terms of the option agreement, and within the time limited thereby, or by the law, where no time limit is fixed by the agreement, that an executory contract of sale results, of whch a court of equity will require the specific performance.
>
> "The particular act or acts which constitute an election may be fixed by the terms of the op-

tion, such as payment of the price, in which case payment of the price is made a condition precedent to the exercise of the right to buy, and the money must be paid or tendered, and a mere notice of intention to buy, or that the optionee will take the property does not change the relation of the parties and does not raise a binding promise upon the part of the optionor: Clarno vs. Grayson, 30 Or. 111, 142 (46 Pac. 426); Kingsley vs. Kressly, 60 Or. 167, 173 (111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746); Davis vs. Brigham, 56 Or. 41, 47 (107 Pac. 961, Ann. Cas. 1912B, 1340); Killough vs. Lee, 2 Tex. Civ. App. 260 (21 S. W. 970); Winders vs. Kenan, 161 N. C. 628 (77 S. E. 687); James on Option contracts, Secs. 816, 817, 914, 924.

In Herndon vs. Armstrong, 148 Or. 602, 608, 36 Pac. (2d) 184, 38 Pac. (2d) 44, the Court said:

"Options to purchase real estate are merely offers to sell property and until acceptance and their conditions unconditionally performed, they confer no title to the realty. To develop an offer into a contract requires its acceptance in precise terms: Strong vs. Moore, 105 Or. 12 (207) P. 179, 23 A. L. R. 1217): Strong vs. Moore, 118 Or. 649 (245 P. 505); Wetherby vs. Griswold, 75 Or. 468 (147 P. 388). An option to purchase real estate does not pass to the optionee any interest in the land, but a contract of sale does transfer to the vendee an interest in the land and therefore a person appearing in the character of an optionee pos-

sesses nothing except the right to buy and he has no interest in the land unless by his acceptance of the option he transfers the option into a contract of sale and changes his character from that of optionee to that of vendee: Strong vs. Moore, 105 Or. 12 (207 P. 179, 23 A. L. R. 1217); Leadbetter vs. Price, 103 Or. 222 (202 P. 104); Richanbach vs. Ruby, 127 Or. 612 (271 P. 600, 61 A. L. R. 1441)."

From the foregoing citations it is very clear that if the resolutions as recited in the minutes of the corporation should be considered as options there would not be any such transfers of *legal title* to stock in a corporation which would make them subject to a transfer tax under the statutes. It appears that an option is not an agreement to sell and it does not embody the right to receive. An option is nothing more than an offer to sell and the optionee can not change it into a contract to sell unless he accepts it in the exact terms of the offer, and he does not have any right to receive any property under the option until he accepts the option by complying with the terms thereof. In other words if the resolutions set forth in the minutes of the corporation in this case were to ripen into contracts or were to place the so called optionees in a position where they had the right to receive anything, they would first have to be accepted by the individuals Griffith, Battleson and Stock by some sort of acceptance. However, the testimony conclusively shows, as heretofore pointed

out, that there was no acceptance, that there was no agreement between the corporation and the parties in writing to buy the stock, that nothing was paid for the stock and that the stock or any part thereof, was never issued or delivered. The resolutions did not give the individuals the right to receive but gave them nothing more than the right to exercise a privilege.

The term "option" is fully defined in 46 C. J. 1122, 1123, as follows:

> "A term variously defined as meaning alternative; choice; election; liberty to elect between alternatives; power of choosing; power or right of election; preference; privilege; right of choice between two things; courses, or propositions; right of choice or election; right of election to exercise privilege; right, power, or liberty of choosing; right, power, or liberty to elect between alternatives; right to choose between one or two or more alternatives; wish."

The Court will clearly see that an option does not carry with it any right to receive but it is merely the right to make an election or the right to exercise a privilege and we submit that the revenue statutes do not go so far as to either directly tax an option or do they attempt in any manner to tax the right to make an election or the right to exercise a privilege. It is also significant if not conclusive, that the regulations promulgated under the statute make no attempt whatever to impose a tax upon options and the utter silence of the regulations should be sufficient to in-

dicate that Congress never intended to impose any tax upon options. It is to be noted that the tax upon the so called options was taxed as a *transfer*. At the time of these resolutions the corporation owned no treasury stock and the stock covered by the resolutions had never been issued. If the position of the Appellant is correct on taxability of options, this would not be a transfer tax but an issuance tax and the resolutions themselves would be nothing more in any event, even under the Appellant's contentions, than a right to subscribe for stock in the corporation. Under Regulations 71, Article 29, sub-division (c), it is pointed out that: "The issue of 'rights' to subscribe for stock evidenced by warrants," is not taxable.

We therefore submit that the purported options were not any transfers of legal title and were not subject to taxation under the statute.

CONCLUSION

We respectfully submit that the findings of fact and the judgment of the District Court in this case was correct and should be examined and a judgment entered for the Appellee, together with interest thereon from the date of the judgment and Appellee's costs and disbursements on appeal.

Respectfully submitted,

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(October, 1939)

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—Stamp Taxes

Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum parchment, or paper upon which such instruments, matters or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

SCHEDULE A.—STAMP TAXES

2. Capital stock (and similar interests) issue: On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned

or described in this subdivision or subdivision 1 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this Act), on each $100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents: Provided, that where such shares or certificates are issued without par or face value, the tax shall be 10 cents per share (corporate share, or investment trust or other organization share as the case may be) unless the actual value is in excess of $100 per share, in which case the tax shall be 10 cents on each $100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than $100 per share, in which case the tax shall be 2 cents on each $20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued).

* * * * *

3. Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of

transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued), 4 cents, and where such shares or certificates are without par or face value, the tax shall be 4 cents on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be): Provided, that in case the selling price, if any, is $20 or more per share the above rate shall be 5 cents instead of 4 cents.

Treasury Regulations 71.

Art. 29. Issues Not Subject to Tax.—The following are examples of issues not subject to the tax:

(a) The issue of stock by domestic building and loan associations, substantially all the business of which is confined to making loans to members, or by mutual ditch or irrigation companies.

(b) The issue of stock by Federal land banks.

(c) The issue of "rights" to subscribe for stock evidenced by warrants.

(d) The issue of new certificates of stock to reflect a mere change in the name of the issuing corporation.

(e) The issue of voting-trust certificates.

(f) The issue, upon a merger of corporations,

of certificates of stock of the same kind by the continuing corporation to its former stockholders in substitution for the old certificates of stock.

(g) The issue of certificates of stock in exchange for outstanding certificates for the purpose of splitting up a certificate for a number of shares into two or more certificates for a smaller number of shares of the same kind of stock, where there is no change in legal title or in the total amount of such stock issued.

(h) The issue of definitive certificates of stock in exchange for temporary or interim certificates upon which the tax has been paid.

(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise.

(j) The issue of stock by a farmers' or fruit growers' or like association organized and operated on a cooperative basis, but only if such association is within the class of organizations exempt from taxation under section 231 (12) of the Revenue Act of 1926.

Art. 34. Sales or Transfers Subject to Tax.—The following are examples of transactions subject to the tax:

(a) The sale or transfer of shares of stock, whether or not represented by certificates.

(b) The transfer of stock to or by trustees.

(c) The transfer of voting trust certificates.

(d) The sale or transfer of temporary or interim certificates.

(e) The sale or transfer of certificates or shares representing beneficial interests in an association. See article 125 (1) (d).

(f) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(g) The transfer of the right to subscribe for stock, whether or not evidenced by warrants.

(h) The transfer of the right to receive a stock dividend already declared.

(i) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(j) The sale or transfer of stock, made by a broker, directly or indirectly, for himself.

(k) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(l) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(m) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(n) The transfer of stock by an administrator or executor to the legatee or distributee.

(o) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(p) The sale or transfer within the territorial jurisdiction of the United States, of stock of a foregn corporation.

(q) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, such a transfer being effected by the act of the parties and not wholly by operation of law.

(s) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(t) Transfer of legal title to stock irrespective of whether or not the transferee receives any beneficial interest therein, except as provided in article 35 (k).

(u) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(v) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

(w) Loans of shares or certificates of stock, including intra-office borrowings.

Art. 35. Sales or Transfers Not Subject to Tax.—The following are examples of transactions not subject to the tax:

(a) The transfer of stock pursuant to a sale,

where the previous memorandum of sale has been duly stamped.

(b) The sale or transfer of enemy-owned stock in American corporations to or by the Alien Property Custodian.

(c) The surrender of certificates in exchange for other certificates representing the same or new stock, provided they are issued to the same holders.

(d) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.

(e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for the certificates representing the old stock of the merging corporations.

(f) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of legal title.

(g) The transfer of stock from the decedent to the administrator or executor of the estate.

(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law.

(i) An agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actual-

ly sold and the delivery or transfer for such purpose of the certificates so deposited; but the person making a transfer of such certificates shall make and sign a statement of the facts and attach it to the certificate.

(j) The return of stock loaned; but the person making the transfer of the stock returned shall make and sign a statement of the facts and attach it to the certificate.

(k) Deliveries or transfers from a fiduciary to a nominee of such fiduciary, or from one nominee of such fiduciary to another, if such shares or certificates continue to be held by such nominee for the same purpose for which they would be held if retained by such fiduciary, or from the nominee to such fiduciary, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts.

(l) The transfer or delivery of certificates to a clearing house for the sole purpose of clearing or adjusting accounts, where no beneficial interest is vested in such clearing house and there has been no change of title or interest.

(m) The mere delivery of a certificate of stock by or on behalf of a customer to his broker solely for the purpose of enabling such broker to make a sale thereof for the customer, where the broker has no ownership or interest therein, is not subject to stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of the owner thereof to the name of a broker, solely for the purpose of enabling such broker to make a sale

thereof for the owner, is not subject to tax, provided the broker shall in every case, at the time of such transfer to him, make and sign a certificate stating that he has no ownership in such stock and that the transfer to him was made solely to enable him to sell the stock for the owner. Such certificate shall in every case be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for the transfer and shall be preserved, together with the old certificate, by such transfer agent, for not less than four years, for the inspection of the revenue officer.

(n) The mere delivery of a certificate of stock from a broker to his customer for whom he has purchased such certificate, where such broker has no ownership or interest therein, is not subject to the stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of a broker to the name of his customer for whom and upon whose order he has purchased such stock, where the tax has been paid upon the transfer of the stock of the broker, is not subject to tax, provided that the broker shall in every case, at the time of such transfer from him, make and sign a certificate stating that the transfer from the broker to his customer is made solely to complete the purchase made by such broker for such customer. Such certificate in every case shall be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer, and shall be preserved, together with the old

certificate, by such transfer agent for not less than four years, for the inspection of the revenue officer.

(o) The certificates required by the two preceding paragraphs shall be in the following form:

(1) (In the case of a transfer to a broker): We hereby certify that we have no ownership or interest in * * * shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

....
(Broker sign here)

(2) (In the case of a transfer by a broker): We hereby certify that the transfer of * * * of the within shares to the names indicated by the star is made solely to complete the purchase made by us for our customer, and we have no ownership or interest therein.

....
(Broker sign here)

No broker who has filed a certificate on the form prescribed under (1) shall file a certificate on the form prescribed under (2) with relation to the same transfer of shares of stock.

(p) A "call" is an agreement to sell and is taxable; but a transfer of a certificate of stock pursuant to the "call" is not taxable, being only a fulfillment of the original agreement. The Seller shall execute and attach to the certificate of stock his certificate, which shall be accepted by the transfer agent and shall be preserved by

him for not less than four years for inspection of the revenue officer. The certificate here prescribed shall be in the following form:

We hereby certify that the transfer of...... shares of the within stock to.................. has been made pursuant to a "call," and that the Federal stock transfer stamps for the transaction are affixed to such "call," which is in our possession.

(q) Where, under paragraph (m) of this article, a certificate of stock standing either in the name of the owner or any other person has been delivered by the owner thereof to a broker for sale, and subsequently, under paragraph (n) of this article, such certificate has been delivered by a broker to his customer for whom it is purchased and the tax has been paid upon the delivery of such certificate from the seller's broker to the buyer's broker, the transfer of such certificate of stock into the name of the buyer is not subject to tax. However, either requisite stamps shall have been affixed to the certificate of stock upon its delivery to the buyer's broker or the memorandum of sale evidencing the transaction between the seller's broker and the buyer's broker, with the requisite stamps affixed thereto, shall have been attached to such certificate at such time and presented to the transfer agent at the time such certificate is surrendered for transfer. The old certificate, together with the memorandum of sale, if used, shall be preserved for not less than four years

by such transfer agent for the inspection of the revenue officer.

(r) Transfer of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

(s) Where trustees hold as joint tenants, upon the death of one title devolves upon the survivor. Such devolution constitutes a transfer by operation of law not subject to tax.

(t) Transfer of stock from maiden name to married name of stockholder.

m.v.